

FORMALITIES, MISTAKE AND CONSTRUCTION  
IN THE LAW OF WILLS

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J.K. Maxton

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## ABSTRACT

This thesis examines three aspects of the law of succession which, it is contended, are ripe for reform.

Modern testamentary practice is governed by s.9 of the Wills Act 1837. That section stipulates the formalities which must be complied with in order to execute a valid will. These apparently simple requirements have produced complex case law due, in large part, to the courts' rigorous insistence on any defect in the formalities automatically voiding a will. An examination of the case law coupled with a study of the underlying rationale for the existence of the formalities is undertaken. Using that background it is suggested that a relaxation of the formalities in cases where the rationale for their existence still obtains will better serve the interests of "a nicer justice" than the present position does. A comparison of six jurisdictions which have instigated innovations in this area of law concludes the first chapter.

The second aspect of the law of succession which is discussed concerns mistakes: how mistakes can occur and how they may be remedied. A categorisation of the common law is attempted: a task beset by difficulties because of sporadic judicial eagerness to overcome legislative inaction. The result comprises many fine distinctions in the interests of trying to "do justice" allied with dissatisfaction on the part of the judiciary on the complicated nature of the law and their limited powers under it.

A case for the extension of those powers is made in third chapter where, after examining the jurisdiction of the courts, it is argued first, that rectification ought to be available as a remedy in the law of wills, and, secondly, that the rules regarding the admission of extrinsic evidence ought to be relaxed.

## CHAPTER I

### FORMALITIES FOR THE EXECUTION OF WILLS

#### 1. HISTORICAL INTRODUCTION

The will as it is known today is generally agreed by commentators to be an institution borrowed from Roman Law.<sup>1</sup> The three major forms of Roman will in use at the time of Justinian couple a high degree of development with a distinct connection with modern testate practice.<sup>2</sup> Those similarities, however, belie the true complications involved in tracing, albeit briefly, the history of the law of succession, for, despite the sophistications of Roman Law, in the view of Pollock and Maitland<sup>3</sup> no

"instrument bearing a truly testamentary character had obtained a well-recognised place in the Anglo-Saxon folk-law."

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1. Parry, The Law of Succession (6th edn) p.3.
  2. The three major forms of will being: first, the testamentum tripertitum (normal will) so called because it incorporated elements of civil law, praetorian law, and the will of the Emperor. This will required the testator's signature, to be sealed by 7 witnesses. Secondly, the nuncupative will, an oral will made in front of 7 witnesses. Thirdly, the testamentum apud acta conditum/principi oblatum which involved having a will recorded in the local archives or sent to the Emperor for safekeeping. See generally Schulz Classical Roman Law and Jolowicz Historical Introduction to the Study of Roman Law.
  3. Pollock and Maitland, The History of English Law (2nd edn), Vol.II, pp.347 et seq.

This situation still obtained after the Norman Conquest, although, in time, the law began to develop. When it did so the law pertaining to real and personal property respectively evolved in different fashions.

Feudalism compelled the monarch's interest in disputes regarding the succession to freehold land on a tenant's death. Such disputes were, therefore, kept within the jurisdiction of the King's Courts of Common Law. In contrast, the ecclesiastical courts supervised the succession to chattels after death.

The principle of primogeniture governed the succession on death to freehold land in feudal times. The nature of the feudal system instilled in feudal lords a deep opposition to freedom of testation for several reasons, chief amongst them being the benefit which might fall to them in the possibility of an escheat for failure of heirs. Other reasons included: a reluctance to allow freeholders to defeat the system of inheritance on intestacy; an unwillingness to deprive overlords of their feudal dues or to disappoint heirs of their expectancies.<sup>4</sup> The culmination of this resistance resulted, from the end of the thirteenth century, in the rule being established in the Royal Courts of Common Law that a freeholder could not defeat the interest of the

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4. Parry, op. cit. p.4.

eldest son (the common law heir) by making a will disposing of the freehold to any other person.<sup>5</sup>

Whilst in some areas circumvention of this rule was possible by resort to exceptional privilege,<sup>6</sup> the usual evasion of the rule was executed by the employment of the "use". This was possible due to the peculiar dichotomy of the Courts of Common Law and the Court of Chancery. The Courts of Common Law vested the legal interest in the grantees at law. This was followed by the realisation of the grantor's initial intention as expressed in his will by the Court of Chancery after his death.

Such a neat device which operated to overcome the rigid lack of testamentary freedom and defeat the Nobles' efforts to control the succession to real property resulted in the abolition of uses, at least temporarily,<sup>7</sup> by the Statute of Uses 1535. Thus the position was regained: real estate could not be disposed of either directly or indirectly by will.

5. Holdsworth, History of English Law, Vol.III p.75 and see Pollock and Maitland op. cit. p.328.

6. For example in Kent where wills were recognised as part of the custom of gavelkind, or in the City of London where the privilege was granted by charter. See Holdsworth op. cit. and generally Simpson An Introduction to the History of Land Law, Chap.1.

7. R.E. Megarry [1941] Camb.L.J. pp.354-360.



The intensity of opposition to that statute was such, however, that the Statute of Wills was passed in 1540. That statute provided that socage tenants had full power to devise their lands by written will whilst tenants in knightservice had power to devise two-thirds of their land.<sup>8</sup> Before examining that statute, it is necessary to trace the development of the law in respect of personalty over the same period.

As stated, the devolution of personal property throughout the Middle Ages was the preserve of the ecclesiastical courts. These courts allowed chattels to be disposed of by will although no formal legislation governing the structure and interpretation of wills existed. What can be established, however, is that this testamentary facility was not unfettered: during the twelfth and thirteenth centuries at least the law recognised a division of a deceased's estates into three parts: the widow's part, the bairns' part and the deid's part. One third went to the widow, one third was divided amongst the children and the other third could be disposed of by will, usually for pious or charitable purposes. The popularity of wills disposing of personalty increased until they became the rule rather than the exception, not least because intestacy was regarded as disgraceful, since it

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8. It is to be noted that the legal right of devising estates in fee simple by will was not completed until 1660 when tenure by knightservice was converted into socage tenure by The Statute of Military Tenures of that year.

implied that the deceased was unshriven: that is, without final confession.<sup>9</sup>

The custom of dividing a deceased's estate in this tripartite manner disappeared in England during the fourteenth century but, as Holdsworth indicates,<sup>10</sup> it remained in York, Wales and London for another 300 years.

Apart from these areas where the custom lingered, from the fourteenth century onwards it was possible for an owner of chattels to dispose of all of them by will. Such a will could be wholly or partly oral.<sup>11</sup> For proof of an oral will the testimony of at least two witnesses was required.

Thus, before 1540 the succession to real estate and to personalty were governed by very different rules. Realty could not be disposed of by will, decreed the Royal Courts of Common Law. In contrast all personalty could not only be disposed of by will (in most parts of England) but such a will did not even need to adhere to any very rigorous formalities. The time was ripe for reform.

Reform came in the shape of the Statute of Wills 1540, significant since it introduced mandatory requirements into the law for the first time. That Act required

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9. Holdsworth op.cit. p.555.

10. Ibid..

11. Ibid. p.537.

that a will of real property be in writing. The testator was not under any obligation to write the will, or even to sign it,<sup>12</sup> and no attesting witnesses were necessary.

Such lax practices were ended in 1677 with the passing of the Statute of Frauds. That Act introduced further formal requirements before a valid will of realty could be effected:<sup>13</sup>

" ... all devises ..., shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

As regards personalty, the Statute of Frauds altered the existing law by requiring writing except in two specific cases.<sup>14</sup> The first of these allowed a testator in his last sickness to make an oral will in the presence of three witnesses with the added requirement that such a will be reduced to writing speedily (within 6 days) otherwise it had to be proved within 6 months of the speaking of the testamentary words.

The second exception allowed oral wills of personalty as long as the value of the chattels disposed of did not exceed £30.

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12. See, for example, *Stephens v Gerrard* 84 E.R. 81: a will written on paper which the testator said he would sign later was admitted to probate despite the fact that he never did sign it.

13. The Statute of Frauds 1677 s.5.

14. The Statute of Frauds 1677 s.19.

It is of note that in the case of personal property where writing was required it was not necessary that the testator should sign or that there be any attesting witnesses.

Although the Statute of Frauds remedied, to some extent, the manifest lack of procedural requirements necessary to execute a valid will, it did not, however, rid the law of succession of all its problems.

A factor which played a leading role in the complication of the law in this area was the continued separate jurisdictions of the Common Law courts and the ecclesiastical courts. The Common Law courts dealt with questions of the validity of devises of realty whereas the ecclesiastical courts retained their power to make grants of probate in respect of personal property. Since testators often left a single will dealing with all of their property, if that property consisted of both realty and personalty it could be a costly, litigious exercise to establish questions of validity in two different courts.

Further confusions existed: as De Villiers notes<sup>15</sup> there were nominally six separate types of wills, whose classification depended on the nature of the asset disposed of, and which each had their own peculiar set of sub-rules. The resultant mass of litigation was inevitable. The development of detailed and difficult rules of construction exacerbated the situation. Resolution of such problems was

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15. De Villiers, J., Real and Personal Property in England, Cambridge University Press 1966 @ pp.4-5.

called for.

It was not, however, until 1833 that any wholesale resolution was attempted. In that year the Real Property Commissioners in England examined the question of the execution of wills and in their Fourth Report made sweeping proposals for reform.<sup>16</sup>

The basis of their proposals lay in the view that a uniform method of testamentary execution was desirable. The Commissioners proposed that all wills should be required to be executed in one simple form which could be easily and generally understood. To this end, they concluded that the Statute of Frauds formalities should be retained for all wills.<sup>17</sup> Thus a uniform set of formalities was achieved. It is possible, indeed probable, that most testators understand the formalities, as the Commissioners desired, although their attempts to comply accurately with them would tend to prove otherwise. One Australian author recently commented:<sup>18</sup>

"Faced with the difficult task of writing out the provisions of their will, signing their name just below the final word of these provisions in the presence of two persons, and then remaining in the room while these same two persons add their own

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16. In all, 58 "Propositions" were recommended.

17. Exceptions obtained in respect of soldiers, sailors and mariners as, indeed, in most jurisdictions, they do today.

18. Palk, Simon N.L. Informal Wills: From Soldiers to Citizens (1975) Adel. Law Rev. 382.

signatures, would-be testators have contrived a myriad of variations. Testators have restlessly wandered their houses while witnesses have signed. Witnesses have come and gone like the ebb and flow of the tide. Attestation clauses have travelled north, south, east and west across the page. Weird and mysterious scratchings have appeared in the place of signatures. Codes have been employed, no doubt for fear the will may fall into enemy hands. Egg-shells have proved almost more popular than paper."

Notwithstanding such problems, the Wills Act 1837 has survived with only minor modifications<sup>19</sup> in most common law jurisdictions to the present day.

## 2. FORMAL REQUIREMENTS

As already indicated<sup>20</sup> the Statute of Frauds was the precursor of the modern Wills Act formalities. Four requirements of the Statute of Frauds formed the basis of the extant conditions for testamentary validity:<sup>21</sup>

- (1) The reduction of the dispositive provisions to writing.
- (2) The affixing of a signature by or on behalf of the testator, in the presence of the witnesses.

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19. For example, the Wills Act Amendment Act 1852 (U.K.) provided a certain latitude as regards the position of the testator's signature.

20. Supra p.8.

21. The Statute of Frauds 1677 s.5; and see p.6 supra.

- (3) The attestation by the witnesses in the testator's presence.
- (4) The subscription by the witnesses in the testator's presence.

The Wills Act provision incorporating these requirements, and others, which must be at the foundation of any discussion of formalities is section 9 Wills Act 1837.

Section 9 provides that:

"No will shall be valid unless it shall be in writing and executed in manner herein-before mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Before embarking upon an individual analysis of the formalities embodied in section 9, it is intended to examine the rationale behind the existence of such formalities. That done, a better appraisal can be made of the existing formal conditions of validity coupled with, it is hoped, better informed possibilities for improvement in the law.

(i) The Rationale of the Wills Act Formalities

Whilst formalities for the execution of wills may vary from jurisdiction to jurisdiction, systems with the Wills Act 1837 as the basis of their succession laws share common ground as regards the rationale for the introduction of that Act and its subsequent retention.

The rationale justifying formalities was put forward by De Villiers in 1901 as follows:<sup>22</sup>

"It is obvious that wills are always more than other legal documents open to the dangers of fraud, perjury and forgery, duress and undue influence, and to doubts as to the mental capacity of the testator, for the reason that the testator is necessarily unable personally to guard against these dangers at the time when the will takes effect. On this account most or all systems of law have required some formality or other to be observed in the execution of wills."

More recently an Australian author framed the rationale for formalities as existing to provide<sup>23</sup>

"sufficient protection against witnesses who would misrepresent the wishes of those who are dead and unable to give direct evidence of their testamentary wishes and acts."

Professor Langbein of the University of Chicago has classified the purposes of the Wills Act formalities as four-fold.<sup>24</sup> These he itemises as the "evidentiary", "channelling", "cautionary" and "protective" functions of the formalities.

The evidentiary function is served by the requirement that wills be in writing. The paramount purpose of the Wills Act is to provide the court with sufficient reliable evidence of testamentary intent and of the terms of the

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22. De Villiers, J. op. cit. @ p.105.

23. William F. Ormiston, Q.C. "Formalities and Wills: A Plea for Caution" (1980) 54 A.L.J. 451.

24. See (1975) 88 Harv. L. Rev 489 @ pp.491-498.



testator's wishes. Legal conditions stipulating the position of the testator's signature, its attestation and subsequent subscription by witnesses are all substantial indications in favour of the document's authenticity. Holographic wills and, to a greater extent, nuncupative wills share deficiencies in this regard.

The channelling function involves a recognition of the undoubted fact that use of uniform criteria to execute wills makes for a more efficient administration system as well as reduced litigation and uncertainty. As an American writer some 40 years ago put it:<sup>25</sup>

"One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels ... ."

Such channelling enables the document to move through the judicial system with a minimum of friction. Again, holograph and nuncupative wills serve the channelling function less well as their less stringent formalities make it more difficult to discern whether the communication in question was intended to be of a testamentary nature.

The cautionary function of the formalities is to be found in the procedure and ceremony surrounding the formal execution of a will. The seriousness of his undertaking is thereby thought to be emphasised to the testator. As Professor Langbein states:<sup>26</sup>

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25. Fuller, Consideration and Form (1941) 41 Colum.L.Rev. 799, @ p.801-803.

26. J.H. Langbein op. cit. p.495.

"Writing is somewhat less casual than plain chatter. As we say in a common figure of speech, "talk is cheap"."

Further, since a will is ambulatory and therefore does not deprive the disponor of any enjoyment of the property during his life, without some formal rigidity a testator might be tempted to make rash or, at least, ill considered dispositions: after all, they will not affect his own material well-being. The requirements of the Wills Act 1837 go some way towards curbing this possibility.

Although holographic wills might be executed after careful, deliberate thought they might just as easily be the result of a casual, off-hand testator. The cautionary function of the formalities may then be missing. Nuncupative wills can be criticised on the same basis but their limited use, usually in dangerous situations, is likely to have the same sobering and steadying effect on the mind as complying with formalities is intended to have.

The protective function of the Wills Act formalities can be easily appreciated. The location of the testator's signature is an attempt to make unauthorized additions to the will more difficult. The requirement of independent witnesses seeks to ensure that no fraud or undue influence is practised and that unbiased evidence of the testator's mental capacity can be adduced. Holograph wills make no pretence of serving this function. Nuncupative wills, on the other hand, requiring attestation clearly do so albeit in a limited fashion.

Whether the foregoing reasons for the existence of

the Wills Act formalities can be achieved in any other way in addition to or instead of meeting the legislative standards themselves is an interesting and controversial question.

In 1971 the English organization "Justice" expressed the view that<sup>27</sup>

"... the relative lack of formality required for the making of an English will is in fact a serious disadvantage because it conceals from the ordinary testator the difficulties inherent in disposing of his estate."

The Organization contrast buying a house ("the only property transaction of comparable importance")<sup>28</sup> with executing a will and conclude that the multitudinous formalities and virtually inevitable solicitor involvement in the former are often missing in the latter. They conclude that the resulting problems stemming from home-made wills could be circumvented by the adoption of a notarial system for the attestation of wills whereby an authorized person, such as a Commissioner for Oaths, would be an official witness before whom a will could be formally executed:<sup>29</sup>

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27. "Home-Made Wills, A Report by Justice p.4.

28. Ibid. p.5.

29. Ibid. pp 4-5.

"The principal advantage of the notarial system, in our view, is that the need to have a will formally executed in the presence of a Commissioner for Oaths or probate official would indirectly lead more testators to take proper legal advice before executing their wills. In addition, the problems of formal invalidity would be completely eliminated, and while a notary could not be expected to make any serious investigation of the state of mind or circumstances of the testator we think his presence would still form a more effective barrier against the more blatant forms of undue influence than the present system provides."

They continue:<sup>30</sup>

"These arguments of course, only apply if notarial execution is made compulsory. On the other hand, the full benefits to be expected from a notarial system will not be achieved if it is introduced only as an alternative to the present system."

To date, no such compulsory notarial system has been introduced in England.

Whilst the proposals of the Organization may go some way towards ridding the justice system of wills which do not comply with the strict formalities of section 9, it is submitted that such a move would only be of extremely limited use. It accepts the formalities of section 9 in most respects<sup>31</sup> and is merely an attempt at streamlining the system so that wills are not invalidated on those formal grounds alone. By taking such a stance the

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30. Ibid. p.6.

31. Despite expressing limited misgivings @ p.7.

Organization has ignored, or side stepped, the wider issue already alluded to,<sup>32</sup> namely: Are the particular formalities of section 9 the only or the best methods of achieving the reputed reasons for their existence?

The question whether the formalities of section 9 themselves could, or should, be pared down to a minimum threshold level is discussed at the end of this chapter. What does merit attention here, however, is whether other types of will might be recognised by our legal system. Such wills, it is submitted, would have to satisfy the generally accepted rationale behind the formalities of the Wills Act. But, that, it is suggested, need not necessarily prove to be too arduous an obstacle to overcome.

Holograph wills do not of necessity fail to embody any of Langbien's four reasons for the existence of formalities, save the protective aspect. That alone, it is submitted, need not operate to preclude their general entry into our legal system.<sup>33</sup> Support for this view can be found in the persuasive critique of the protective policy by Gulliver and Tilson.<sup>34</sup> Their principal arguments are:

- (1) That the attestation formalities are inadequate to protect the testator from determined rogues, and

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32. Supra p.14.

33. Such wills can be validly executed as privileged wills. See Wills Amendment Act 1955 ss.4-6 (N.Z.)

34. Classification of Gratuitous Transfers (1941) 51 Yale L.J.1 @ pp.9-13.

- (2) That protective formalities do more harm than good, voiding home-made wills for harmless violations.

It is with their second argument that the authors of that article find themselves in direct confrontation with the authors of the Justice document concerning home-made wills. Whilst the former aim for a greater degree of latitude in respect of home-made wills, the latter aim to remove such a recognisable category of wills from the law of succession altogether.

Holograph wills, handwritten and signed by the testator, are valid dispositive testamentary documents in some jurisdictions. For example, in Scotland, Manitoba and America they are permitted.<sup>35</sup> The evidentiary, channelling and cautionary functions can be as easily satisfied in a holographic document as in one strictly complying with the Wills Act formalities. The evidentiary function is served by the handwriting; the cautionary through writing and signature and the channelling from the cumulative evidence both in and surrounding the document. It is readily admitted that the channelling function is the least easily satisfied. But simply because a testator is not constrained by the rigours of the Wills Act formalities does not mean that he will necessarily take a casual, careless view of his attempted testamentary dispositions.

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35. Law Reform Committee, England, The Making and Revocation of Wills (Consultative Document) 1977 p.4: s.7  
The Wills Act (Manitoba) 1871, and Uniform Probate Code 2-503 which requires that "the signature and the material provisions [be] in the handwriting of the testator".

Such a view is hyperbolic and lacking in evidence. Not every will executed in terms of section 9 is done in a cool, serious, hard-headed fashion - although the formalities, as indicated, go some way to ensuring that that is the case. By the same token, not every holograph will is executed in an offhand, unthinking manner. There is, it is submitted, a mean between these two extremes. And it is the contention of this writer that such a mean should find recognition in the law.

Whilst not necessarily advocating a general freedom to execute legal holograph wills to be of the same effect as wills complying with the requirements of section 9, it is possible that some concession in this sphere would be advantageous rather than detrimental to the law.

The arguments already reviewed<sup>36</sup> as the rationale of the formalities are, it is submitted, persuasive in militating for the retention of at least some formalities<sup>37</sup> to be complied with in the normal course. Formalities do serve to sharpen the mind and awareness, provide strong evidence and go some way to excluding the unwelcome attentions of fraud and undue influence.

As indicated, however, a place can be found for holograph wills. Under our present system a will written and signed on a paper bag by a lone adventurer in the New

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36. Supra pp. 10-13.

37. See infra pp. 69-73.

Zealand high country before his death would have to be pronounced invalid. Likewise a piece of paper containing the last wishes and signature of a marooned seaman on an isolated South Seas Island. But such documents are plainly evidentiary; a more cautionary situation requiring the channelling of one's thoughts on matters of importance could hardly be imagined than when the threat of death looms large and real, and such situations clearly do not require the protective arm of the law: forgeries, undue influence and fraud are not serious propositions.

Ought the law, then, in such cases where compliance with the formalities is an impossibility, to recognise holograph wills as "the next best thing"?

It is submitted that there are strong arguments in favour of such a course. And indeed not just in cases where meeting the formal requirements is an "impossibility".

Whenever a document, appearing to be of a testamentary nature and written and signed in the hand of the would-be testator, is discovered it is submitted that a court ought to have the power to issue a grant of probate in respect of that same document. Such a novel step for the law would be accompanied by conditions tending to prove the authenticity of the document and its equation with the testator's intention. Such conditions could be satisfied by placing the burden of proving the authenticity on the propounder of the document and, in addition, requiring the court to be satisfied as to all the surrounding circumstances of the execution of the document. For example,



why it was made without formalities, the presence of other persons at its execution, the lack of legal advice and any misapprehensions the testator was under (for example, that the law of another jurisdiction entitled him to make a valid holograph will). For consistency, it is submitted that the civil standard of proof on a balance of probabilities be retained in such cases.

Should the law opt to encompass such documents the rationale lying behind the Wills Act will be more comprehensively realised: instead of automatically rejecting as invalid documents which fail to comply with the formalities effect will still be given to documents which, even without the formalities, evince clear evidence of their own authenticity and the testator's intention. The acceptance of holograph wills is one way this could be accomplished.

Arguments against this view tend to take the line that a relaxation of the formalities in any form is merely the "thin end of the wedge": the floodgates will soon admit any tenuously testamentary document as a valid will. A two-fold rebuttal may suffice: first, the courts will only be able to admit any such document after clear proof that it was intended to be of a testamentary nature; that it was written by the testator and reflects his intention (so far as that can be ascertained) and that it was not made under any form of pressure or duress. Thus the likelihood of any but the most worthy documents being ascribed testamentary status is remote. Secondly, the rigid implementation of the formalities can wreak injustice

in the sense that the rationale of the formalities in such circumstances augurs for the acceptance of such documents on a valid dispositive footing. To deny the rationale of the requirements for want of a minor formality ought not to be tolerated. To reiterate, the acceptance of holograph wills provides a means by which this could be done.

It is, by no means, however, the only method by which the underlying rationale of the Wills Act formalities could be better given effect to. Other possibilities which have been canvassed over the last decade include: the doctrine of substantial compliance,<sup>38</sup> a general discretion in the hands of the court,<sup>39</sup> a relaxation of the formalities themselves and a relaxation of the rules of evidence to facilitate the admission of all items of relevance.<sup>40</sup> The illuminating possibilities shed by these suggestions will be discussed in the section following that dealing with the formalities of section 9.

The other main type of will which might claim a stronger foothold in our system is the nuncupative will. Whilst recognised as a form of privileged will<sup>41</sup> it has failed to be recognised as a major dispositive alternative

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38. See esp Langbein op. cit.; Manitoba Law Reform Commission "The Wills Act" And the Doctrine of Substantial Compliance.

39. 28th Report of the Law Reform Committee of South Australia (1974) and its result in s.12 Wills Act 1936-1975.

40. Law Reform Committee (England) 19th Report (Interpretation of Wills) Cmnd. 5301.

41. See e.g. The Wills Amendment Act 1955 s.6 (N.Z.).

despite the fact that given certain circumstances such a will may satisfy most of Langbein's four functions for the existence of the formalities. Such functions as it fails to meet need not detract from its authenticity. For example, suppose a fisherman swept overboard called out his last desperate wishes to the rest of the ship's company before being lost in heavy seas. Such an attempted oral disposition, whilst not meeting the evidentiary function of writing, would certainly be the result of a mind cautioned and channelled by the peril of the disponor to an extent which claims the audience of a court and renders discussion of the protective function of the law in such circumstances to be of minimal importance, if not, indeed, irrelevance.

The possibility of according nuncupative wills full legal effect was suggested in America in 1946. By s.49(b) of the draft provision of the Model Probate Code of that year the following circumstances for their inclusion were outlined:<sup>42</sup>

- "(1) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be
  - (a) Declared to be his will by the testator before two disinterested witnesses;
  - (b) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and
  - (c) Submitted for probate within six months after the death of the testator.

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42. See Working Paper No.28 The Making-Revocation of Wills, Law Reform Commission of British Columbia p.180.

- (2) The nuncupative will may dispose of personal property only <sup>and</sup> to an aggregate value not exceeding one thousand (\$1,000) dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand (\$10,000) dollars."

Such a suggestion, whilst going some way to recognise the deficiencies in the law wrought by a rigid adherence to formalities, is, it is submitted, still inadequate.

A nuncupative will, to be admitted to probate, requires to be clearly shown to be a true record of the deceased's wishes (the evidentiary function). It must also be proved to have been made as a will with due regard to its import (the channelling and cautionary functions). Finally, it must be made free from any external pressures (the protective function).

The evidentiary requirements could be established by an insistence on disinterested witnesses, a subsequent reduction to writing under their auspices, and a limited time for submission to probate. Thus far the former American proposal is satisfactory.

The channelling and cautionary functions can, it is contended, be satisfied by closely defining the circumstances in which such wills may be effected. The Americans suggested their admission to probate if made by a person "in imminent peril of death" and "only if the testator died as a result of the impending peril". In such a situation it would be hard to envisage a testator who was not aware of the gravity of his predicament. (The rationale behind

the erstwhile admission of dying declarations into the law of evidence in New Zealand would be applicable here.) The difficulties encountered would lie in setting the parameters of meaning of the phrases "in imminent peril of death" (or "close to death" or "about to die"). Expressions such as these indicate the types of situation which could be legally identified by the law. Problems in discovering a suitable formula to cover oral deathbed wills coupled with the perennial legal difficulty of interpretation should not, it is suggested, result in the sacrifice of such wills in the name of legal simplicity and formalism.

Satisfaction of the protective functions of the formalities would require evidence tending to negate any possibility of duress, coercion, undue influence. Given that the formalities required by the Wills Act are not an effective bar to a determined rogue, it is suggested that as long as such evidence satisfies a court on the balance of probabilities then that, coupled with the evidence of witnesses to the audible remarks of the testator, should operate to ensure the recognition of such wills.

It is notable that, in the opinion of the Law Reform Commission of British Columbia, oral wills would be of small value in attempting to provide the same safeguards as the Wills Act formalities;<sup>43</sup>

"Any form of oral will which came close to providing the same safeguards would be so technical as to be practically useless."

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43. Ibid. @ p.22.

With respect, it is submitted that it has been demonstrated that this need not be so. A determination to give effect to a testator's wishes coupled with precise drafting watched over by a careful judicial eye could ensure that the number of intestacies decrease. In any event, even if the relevant legislation was excessively technical to the point of being "practically useless" if just one more testator's property devolved according to his desires then, it is submitted, the true rationale of the Wills Act would have been achieved, at least in respect of that testator. A willingness to shape the law around not only the general but also the particular ought not to be abandoned because the suggested improvement is difficult, technical or little-used. On this basis the addition of a well-regulated category of nuncupative wills into the law of New Zealand would fill a void which has long been evident.

On the subject of whether nuncupative wills should be limited to certain types or amounts of property, as in the former American draft,<sup>44</sup> it is contended that the reasons for doing so are outweighed by those militating against the practice.

If the rationale behind the Wills Act formalities can be achieved by the establishment of a set of closely monitored conditions allowing nuncupative wills in "imminent death" situations, then there seems a compelling argument

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44. Supra p.22.

in favour of permitting such wills to be able to perform exactly the same functions as wills executed in accordance with the formalities of s.9 Wills Act 1837. The same rationale has been satisfied: should not the same legal effect be accorded to each?

The view supporting a difference in effect between the types and amounts of dispositions which could be dealt with by these two sorts of will, stems, it is thought, from an innate reluctance in some quarters to allow what is seen as a snag to develop in the law and cause a tear in the sheer fabric sewn by the formalities of section 9. Again, as with holograph wills, the "thin edge of the wedge" argument is employed to emphasise the manifold possibilities of every jocular oral expression of intent being eventually construed as a nuncupative will and that therefore the dispositive powers of such wills, if they must be, must be severely limited. This argument suffers from an excess of hysteria. It must be stressed, first, that the only type of nuncupative will foreseen is that arising from "imminent peril"<sup>45</sup> or "deathbed" situations. Secondly, the point must be reiterated that if the rationale for the Wills Act formalities is satisfied then any type of will legally recognised thereafter ought to be able to perform all testamentary functions. Any other conclusion involves the acceptance of a hybrid dispositive power lacking any sensible reason for the distinction.

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45. Supra p.22.

Having thus considered holograph and nuncupative wills as possible contenders to give better practical effect to the rationale of the Wills Act formalities in particular and to enhance the law of succession in general, it is now time to discuss the formalities themselves to assess whether they do in fact enact their purported rationale satisfactorily and to attempt to gauge whether any possible reforms might usefully be suggested.

(ii) A Detailed Examination of the Formalities

It has been ascertained that section 9 of the Wills Act 1837 embodies most of the formalities necessary to execute a valid will.<sup>46</sup> A close scrutiny of the formalities will now be undertaken, bearing in mind the current dissatisfaction in many jurisdictions with the excess of formalism surrounding them. For example, the Manitoba Law Reform Commission states:<sup>47</sup>

"In Manitoba, as in other areas, literal compliance with the formalities is mandatory. That is, the slightest defect as to form invalidates the will. This formalistic approach has created a body of harsh and often inconsistent case law."

And, again with Professor Langbein:<sup>48</sup>

"The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in

46. The section is set out at p.10 supra.

47. Op. cit. pp.5-6.

48. Op. cit. p.489.



formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails."

It is accepted that our courts have no discretionary power to admit to probate an authentic will which is invalid under section 9.<sup>49</sup> At this juncture the law of succession is commonly criticised for parting company with other legal subjects which require formalities. Formalities are present in various parts of the law, but the courts of probate are especially noteworthy for holding that, although the testator's genuine intention to make post-mortem dispositions has been manifested, nevertheless, non-compliance with s.9 Wills Act 1837 necessitates a decision being handed down which precludes that intention from being carried into effect.

Whether it is desirable to rectify this rigidity and, if so, by what means involves a study of the formalities themselves.

It is proposed to examine the formalities under four headings:

- (a) Writing
- (b) Signed by the testator
- (c) Signature of testator and presence of witnesses
- (d) Attestation and subscription by witnesses.

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49. Parry and Clark The Law of Succession p.16.

(a) Writing. The Wills Act provides that a will must be in writing, but it places no restrictions on the type of materials which may be used or on the type of materials on which the will may be written.<sup>50</sup> No special form of words is necessary and it is immaterial what language is used:<sup>51</sup> the terse instruction "all for mother" has been held to constitute a valid will.<sup>52</sup>

A will may be made in pencil or in ink or in a combination of the two. If a will is partly in pencil and partly in ink, it is likely that the pencil writing will be treated as deliberative and not final.<sup>53</sup> Likewise in the case of pencil alterations.<sup>54</sup>

(b) Signed by the testator. Section 9 requires that a will "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction". The courts have traditionally given a broad interpretation to the words "signed by the testator" and no particular form of signature is necessary. A mark placed on the will which was in some way intended as the

50. e.g. *Hodson v Barnes* (1926) 43 T.L.R. 71 (writing on empty egg shell).

51. An extreme example of this is illustrated by the case of *Kell v Charmer* (1856) 23 Beav. 195 where sums bequeathed were represented in letters using a jeweller's private code.

52. *Thorn v Dickens* [1906] W.N. 54.

53. *In bonis Hall* (1871) L.R. 2 P & D. 256.

54. *In bonis Adams* (1872) L.R. 2 P & D 367.

testator's signature will suffice. A good illustration is provided by *In the Estate of Finn*<sup>55</sup> where a smudged thumb-mark, duly attested, enabled a will to be admitted to probate. Langton J. gave a commendably succinct judgment:<sup>56</sup>

"Illiterates were much more common a hundred years ago than nowadays, but if a mark was the only way a testator had of making his signature it came within the meaning of the statute. The thumb-mark in the present case is no worse than a cross and I shall admit the will to probate, but the method adopted does not commend itself to me at all."

The latitude of the law exemplified by that case has enabled a rubber stamp,<sup>57</sup> initials<sup>58</sup> and a mark of any shape,<sup>59</sup> as long as the testator intended it as his signature, to satisfy this requirement. The words "your loving mother" have also been found acceptable,<sup>60</sup> the judge in that case being content that those words were intended to represent the testatrix's name. An absence of the intention that any mark, form of words or name was meant to constitute a signature to give effect to the will will result in the purported testamentary document being excluded from probate.

55. [1935] All E.R. Rep. 419.

56. Ibid.

57. *In bonis Jenkins* (1863) 3 Sw & Tr 93; 164 E.R. 1208.

58. *In bonis Savory* (1851) 15 Jur. 1042.

59. *In the Estate of Holtam* (1913) 108 L.T. 732 ("a sort of broken line").

60. *In the Estate of Cook* [1960] 1 W.L.R. 353.

Therefore, in *In the Estate of Bean*<sup>61</sup> where a testator had accidentally omitted to sign his will but wrote his name and address on an envelope containing it, the court refused to grant probate of the will and envelope because the testator wrote his name on the envelope in order to identify its contents, not as a signature to the will. Put another way, the signature on the envelope was not written animo testandi. Therefore, although a specimen signature of the testator was available on a document with a close connection with the will, because it was not intended to authenticate the entire document all the purported dispositions therein were nullified. It is lamentable that the courts have not seen fit to adopt an approach to this type of situation more in keeping with their already noted<sup>62</sup> willingness to give a broad interpretation to the word "signature" in order to validate a will whenever possible.

In the view of an English author, the most disturbing factor of decisions such as *In the Estate of Bean* has been that on authority, but not on principle, they have been correctly decided.<sup>63</sup> He states:<sup>64</sup>

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61. [1944] P. 83.

62. Supra p.29.

63. G.M. Bates A Case for Intention (1974) 124 N.L.J. 380 @ p.381.

64. Ibid.

"The conflict has been recognised in many cases, and, if not categorically stated thus, the conviction that the expressed intentions of the deceased should prevail if possible, has led at least to a greater willingness on the part of the judiciary to work out a credible diversion around the statutory provisions and ultimately to a conclusion in favour of validity."

An example of such credible diversionary tactics can be found in the case of *In bonis Mann*.<sup>65</sup> There, probate was granted of an unsigned will contained in a signed envelope, Langton J. being satisfied that the deceased had written her name on the envelope with the intention that it should operate as her signature to the will. The learned judge took the view that:<sup>66</sup>

"There cannot be any doubt whatever as to the intentions of the testatrix ... ."

and continued:<sup>67</sup>

"Where the circumstances are so plain and so well-ascertained as to preclude all possibility of fraud, the reasons supporting the strict application of the rule are greatly diminished."

On the basis of such statements Bates contends that at least where there is no possibility of fraud the strict statutory formalities ought to be given the "go-by" in favour of the testator's true intentions.<sup>68</sup> The adoption of such an argument would, it is submitted, give better effect to the

65. [1942] P.146.

66. Ibid. @ p.

67. Ibid. @ p.

68. Op. cit. p.381.

rationale behind the formalities. Where the protective function, for example, is clearly satisfied (no external pressures of, say, duress or undue influence being applied) then it appears overly-officious and distinctly unbeneficial to all concerned to insist on the will being pronounced invalid for lack of a formality which is, in a given case, superfluous to the attainment of the general rationale behind the formalities.

A lack of leniency in judicial interpretation has also been evident in the decisions handed down on the position of the testator's signature.

Section 9 of the Wills Act 1837 required the signature to be "at the foot or end" of the will. Early cases invalidating wills on extremely technical grounds<sup>69</sup> as the courts pursued their goal of strict compliance, led to the passing of the Wills Amendment Act 1852. That Act expanded the definition of the term "end" to include numerous locations on the face of the will. After 1852, therefore, a will would be pronounced valid if the signature was positioned:

"... at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and no such will shall be affected by the circumstance that the

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69. For example, *Smee v Bryer* (1848) 1 Rob. Ecc.616 in which a will was held invalid because the signature of the testatrix was not placed in eight-tenths of an inch left blank at the bottom of a page but, instead, on the next page.

signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; ... "

The Act ends with two prohibitions: a signature can never operate to give effect to any part of the will:

- i) which is underneath or which follows the signature in space or
- ii) which was inserted later in time after the signature was made.

Despite this full, even verbose, explanation contained in the 1852 Act, cases on the positioning of a testator's signature have been many in number.

The general inclination of the courts has been towards a lenient interpretation of the Act in order to save wills from invalidity. This, however, has not been a consistent inclination with the result that not only has the language of the Act been severely tested but also a mass of difficult, conflicting decisions has been created.

In *Re Roberts*<sup>70</sup> the testator, having reached the end of his hand-written will, was forced by the exigencies of space to extend his signature along the margin on the left hand side of the page. The result was that the testator's own signature was written physically opposite to the beginning of the will. It was held, nevertheless, that the will was valid. The court regarded the entire margin as opposite to the end of the will.

The celebrated case of *In b. Hornby*<sup>71</sup> took an even more radical line. In that case the testator ruled off an oblong box about half way down one side of a page. He then wrote his will around the box finally affixing his signature in the box itself. Wallington J. upheld the will stating that the signature in the box was "in the intention of the testator, at the end of the will".<sup>72</sup> In this case, therefore, the whereabouts of the end of the will was made to depend upon the intention of the testator.

Hardingham, Neave and Ford strongly emphasise the inadequacy of Wallingham J's test in that it fails to give due weight to both the position of the signature and the intention of the testator as required by the 1852 Act.<sup>73</sup>

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70. [1934] P.102.

71. [1946] P.171.

72. Ibid. @ p.179.

73. The Law of Wills @ p.30.



Such criticisms, it is submitted, have considerable force and highlight an unreasonable tendency on the part of some members of the judiciary to give effect to the testator's wishes notwithstanding the words of the relevant legislation.

Not all judges have fallen prey to these inclinations. The result has been the compounding of a collection of inconsistent case-law.

In *Re Stalman*,<sup>74</sup> for example, a testatrix squeezed her signature in at the top of the will since there was no room at the bottom. The Court of Appeal had no difficulty in holding that a will signed at the beginning was invalid, being contrary to the first prohibition in the 1852 Act.<sup>75</sup>

Similarly in *Re Beadle*<sup>76</sup> where a testatrix signed a will in the top right hand corner and on the envelope wherein it was contained, both signatures were held not to be in compliance with the Wills Act. The former for the reasons given in *Re Stalman*, the latter because it was intended merely to identify the contents of the envelope not to authenticate the whole will.

The overwhelming feeling gleaned from this maze of difficult, tortuously reasoned cases is one of judges in a cleft stick: keen to validate as many testator's wishes as possible but, at the same time, hidebound by the

74. (1931) 145 L.T. 339.

75. The two prohibitions are outlined at pp.33/34 supra.

76. [1974] 1 All E.R. 493.

formalities of the Wills Act coupled with the doctrine of strict compliance. Bates<sup>77</sup> suggests a possible safe passage out of this Catch 22 situation: he submits that:<sup>78</sup>

"All that should be necessary is that the signature should be intended to validate the whole of the document, no matter where it is placed. The strict statutory requirements can easily be overcome in favour of the testator's wishes by construing the foot or end of the will simply to mark that place where the testator intended to finish the business of making his will.

In any case it is submitted that in the absence of any evidence of fraud, the testator's signature, wherever it is placed, should be taken to signify this and validate everything on the paper or papers."

This suggestion comes remarkably close to Wallingham J's statements in *In b. Hornby*<sup>79</sup> and accords with the general argument of this author that if the rationale of the formalities can be satisfied without strict compliance with the actual formalities then only those formalities necessary to achieve the rationale ought to be required: the others can safely be abandoned, as Bates suggests.

Such a proposal is not nearly as novel as it first appears. For example, in *In the Estate of Long*<sup>80</sup> the judiciary felt able to give effect to the proposal but had to do so by careful, exhaustive reasoning which strained

77. G.M. Bates A Case for Intention, supra @ n.63 contains a useful critical analyses of these cases and others.

78. Ibid. p.381.

79. [1946] P.171 and supra p.35.

80. [1936] P.166.

the very limits of the law. Bates' suggestion obviates the necessity to perform mental legal gymnastics.

In *In the Estate of Long*<sup>81</sup> a testatrix wrote her holograph will on both sides of a piece of paper: on one side appeared the heading of the will, the appointment of an executor, and an attestation clause with the signatures of the testatrix and attesting witnesses, and on the other appeared a list of bequests. Sir Boyd Merriman P. granted probate in respect of both pages, reading the will as beginning with the bequests and ending with the signatures. In the course of his judgment he remarked:<sup>82</sup>

"Provided that the Court is satisfied that the whole document was written before the signatures were made, and that the dispositive part of the document may be fairly read as preceding and leading up to the part containing the signatures, and in no sense as a mere annexe or schedule thereto, I think that it would be transgressing what Sir James Hannen in *In the Goods of Wotton*<sup>83</sup> called "the spirit of the Act" to insist, as a criterion of valid execution, upon proof that the several parts of the document were actually written in any particular order."

Other judges have followed this line insofar as they have been able.<sup>84</sup> Inevitably, however, this has not

81. Ibid.

82. [1936] P.166 @ p.173.

83. (1874) L.R. 3 P & D 159 @ p.161.

84. See, for example, *In b. Smith* [1931] P.225 (pages of will read in order 2, 3 and 1 so that the signature of the testatrix at the bottom of page 1 was at the end). *In b. Gilbert* (1898) 78 L.T. 762 @ p.763 (emphasising that this approach can only be taken if the will is a "circle" i.e. no pages requiring to be read either before or after any others), *Re Young (deceased)* [1969] N.Z.L.R. 454 (sufficient nexus found in pressing pages together).

always been possible.<sup>85</sup>

To leave the judiciary to stretch the meaning of an inelastic piece of legislation thus far to give effect to testators' intentions is irresponsible and not conducive to the establishment of fair, equitable principles. Justice, in any given case, has been made to depend on a judge's willingness and wiliness in overcoming or circumventing the obstacles provided by the formalities of the Wills Act. The time has come, it is submitted, for the legislature to rethink the aims of the Wills Act and only to require such formalities as give effect to those aims. A needless adherence to formalities has brought extra problems to a sufficiently complex area of law: simplification is to be welcomed.

(c) Signature of testator and presence of witnesses.

The Wills Act requires that a testator must make, or acknowledge his signature in the presence of two or more witnesses who are present at the same time.<sup>86</sup> The prevalence of "inequitable decisions"<sup>87</sup> in this area is largely because of

85. See for example *In b. Gee* (1898) 78 L.T. 843; *In e. Bercovitz* [1962] 1 W.L.R. 321 and the Practice Direction [1953] 1 W.L.R. 689 which points out that "an incorrect practice appears to have grown up as regards wills which are signed only at the foot of the first page, but which, for lack of space, are continued upon the next page". It goes on "no such continuation should be admitted as part of the will unless there is also a reference, above the signature on the first page, which effects incorporation".

86. Wills Act 1837, s.9.

87. Manitoba Law Reform Commission @ p.6.

these stringently enforced requirements. The section demands that the making or acknowledgment of the testator's signature must occur before either of the witnesses signs as a witness. The result, therefore, is that if a witness appends his signature before the occurrence of that event it will be useless. The apparent simplicity of this rule is deceptive, as the cases reveal.

In *Re Davies*<sup>88</sup> a testatrix signed her will in the presence of the first witness who then signed it as a witness. At that point no other witness was present. Subsequently a second witness entered the room. The testatrix acknowledged her signature to him and he then signed as a witness. It was held that the will was invalid: there had not been a single act of signing (or acknowledgment) in the presence of both witnesses before either of them signed.

In *Re Colling*<sup>89</sup> a will was struck down on the same ground. A testator began to sign his name in the presence of two witnesses. During the act of signing, however, one witness left the room. The signature was completed in her absence. The witness remaining in the room signed the will. The second witness then returned and both the testator and the first witness acknowledged their signatures to her. She then signed as a witness.

The acknowledgment to both witnesses was ineffective as they did not both subscribe thereafter. And, since the

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88. [1951] 1 All E.R. 920.

89. [1972] 3 All E.R. 729.

full process of signing by the testator had not been completed in the presence of both witnesses the requirements of section 9 had not been complied with. Consequently the will was declared invalid.

In giving judgment Ungoed-Thomas J. commented on the fact that section 9 was designed for the avoidance of fraud, and continued:<sup>90</sup>

"It is perhaps, unfortunate ... that the section has manifestly on occasion defeated the intention of the testator and, in some cases, of which this is one, glaringly so."

He went on:<sup>91</sup>

"The requirements of the section ... are established as strict and technical. Both the technicality and the effect of defeating a testator's intentions are brought out very clearly ... by the observations of Morris J. in *Re Davies*.<sup>92</sup> In that case ... Morris J. observed:

" ... I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix."

I feel, with great regret, driven to the same course in this case."

Despite perceiving the inequity of their decisions many judges have been forced to similar conclusions.<sup>93</sup>

90. Ibid. @ p.730.

91. Ibid. @ pp.730-731.

92. [1951] 1 All E.R. 920.

93. For example see *Re Groffman* [1969] 2 All E.R. 108; *Moore v King* (1842) 163 E.R. 716; *Hindmarsh v Charlton* (1861) 11 E.R. 388; cf. *Re Gibson (deceased)* [1953] N.Z.L.R. 122.

The frequently harsh results of an unyielding strict compliance with these formalities has not gone unnoticed by Reform Committees in several jurisdictions.

The Law Reform Committee in England is currently reassessing the necessity for two witnesses to be present at the same time.<sup>94</sup> In the United States the Uniform Probate Code proposes abolishing the requirement that the two witnesses be present when the testator signs the will.

The official commentary to the Uniform Probate Code asserts:<sup>95</sup>

"The formalities for execution of a witnessed will have been reduced to a minimum."

The will must be in writing and the testator must sign or acknowledge it to two witnesses. Remarkable by their absence are the requirements that the witnesses sign in the testator's presence, that the testator sign it "at the foot or end thereof" and that the witnesses be competent (disinterested).<sup>96</sup>

Langbein comments:<sup>97</sup>

"Doubtless the draftsmen balanced the injustice brought about by technical violations of the publication and presence requirements

94. Consultative Document on the Making and Revocation of Wills (1977) @ p.10.

95. 2-502, Comment.

96. cf. s.15 Wills Act 1837 (U.K.) (voiding gifts to an attesting witness, or his or her spouse) and s.3 Wills Amendment Act 1977 (N.Z.) (validating gifts to attesting witnesses if the will is validly witnessed without such additional subscription).

97. Op. cit. @ p.511.

and decided that the incremental cautionary value of those two former requisites was not worth the price in wills invalidated for defective compliance."

It certainly appears from the cases that technicalities have rendered wills invalid when the rationale behind the Wills Act has been satisfied: clear evidence reveals the document to be a testamentary one; the testator is aware of what he is doing and its importance and there is no suggestion of undue influence, fraud or the like but he has failed to comply with the strict formalities. The British Columbia Law Reform Commission recognize and aim to repair this defect in the law:<sup>98</sup>

"It would be possible to modify the formalities of the Wills Act to relax those aspects that most often seem to create difficulties. Alternatively, it would be possible to develop a parallel regime in which different criteria would apply to determine the admissibility to probate of a purported testamentary document."

A discussion of the various regimes either currently implemented or currently proposed by which the strict formalism of the Wills Act can be overcome, follows the next, concluding section which takes a detailed look at the final formality required by s.9 Wills Act 1837.

(d) Attestation and subscription by witnesses. The Wills Act requires the witnesses to attest, i.e. bear witness that the signature was made or acknowledged by the testator in their simultaneous presence, and to sign it. Failure by the testator to sign or acknowledge his signature before either witness signs has probably, in the view

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98. Op. cit. @ p.33.



of Parry and Clark,<sup>99</sup> made more wills invalid than any other cause.<sup>1</sup> Thus, here again, the Wills Act formalities face an attack from the schools of thought which advocate the testator's intention overriding the formalities and not vice-versa.

Whilst both witnesses must sign "in the presence of the testator" they need not sign in the presence of each other. And, unlike the testator, who must sign at the end of the will, a witness may sign anywhere on the document.<sup>2</sup> Courts have held that while the testator must be both physically present and mentally aware,<sup>3</sup> he need not actually see the witnesses sign as long as he could have done so if he had cared to look.<sup>4</sup>

An interesting aspect of this requirement, originally found in the Statute of Frauds, is that in 1833 the Real Property Commissioners recommended that it be abolished. Parliament retained it on the ground that it might prevent a witness from substituting a different will without the

99. Op. cit. @ p. 22.

1. e.g. *Wyatt v Berry* [1893] P.5 (separate acknowledgements to each witness, the second occurring after the first witness had signed. Held, will invalid) and see *Hindmarsh v Charlton* @ n.93 supra.
2. *In the Estate of Denning* [1958] W.L.R. 462.
3. See *In b. Chalcraft* [1948] P. 222.
4. *Tribe v Tribe* (1849) 1 Rob. Ecc. 775 (testatrix unable to turn herself in bed to see witnesses sign; will held invalid); *Newton v Clarke* (1839) 2 Curt. 320 (curtains around the bed which could have been drawn back without an alteration in position; will held valid).

testator's knowledge.<sup>5</sup> Perhaps a reversion to the thinking of 1833 is overdue.

### 3. PROPOSALS FOR REFORM

The mounting dissatisfaction with the strict compliance demanded by the Wills Act is evident from the foregoing discussion. What, then, can be offered as a possible medicament to cure this apparently fatally ill statute? Various suggestions exist.

Professor Langbein favours the introduction of the doctrine of substantial compliance. Thus he calls for:<sup>6</sup>

"reduced formalism in enforcing whatever formalities the Wills Act requires."

His conception of the doctrine assumes that the testator has made some attempt, at least, at due execution. This view has been termed the "narrow approach" to substantial compliance.<sup>7</sup> The "broad approach",<sup>8</sup> by contrast, extends to the court a discretion to validate a document intended as a will, but in respect of which the testator has made little or no effort to comply with the formalities. Langbein explains the difference thus:<sup>9</sup>

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5. Consultative Document on the Making and Revocation of Wills (1977) @ p.10.

6. Op. cit. p.510.

7. See Palk op. cit. p.393.

8. Ibid. p.394.

9. Langbein op. cit. p.526 @ note 27.

"The term [i.e. substantial compliance] is presently used to mean that borderline conduct is close enough to the prototype to be deemed in compliance, but not that concededly defective compliance is permissible on purposive grounds."

The narrow approach, therefore, requires both testamentary intent and its evidence in the form of an attempt at due execution. The broad approach, on the other hand, merely requires evidence of testamentary intent from whatever quarter.

The narrow approach is less objectionable in the United States, where holograph wills are admitted, than in jurisdictions where they are not. In such jurisdictions the narrow approach would preclude their entry into the law of succession, whereas the broad approach would not (assuming always the requisite standard of evidence having been attained). It has been argued earlier<sup>10</sup> that the exclusion of holograph wills satisfying the rationale of the Wills Act ought to be remedied. As such, it is submitted that on this ground alone the narrow approach ought not to be adopted unless possibly, a separate category validating the use of holograph wills has been established.

Another suggestion which aims to improve the results of the formalism of the Wills Act is that of the so-called "threshold requirements".

Advocates of this view reject Langbein's narrow concept of attempted compliance. They would replace it

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10. Supra pp.16-21.

with reduced formalities, for example, merely writing and signature.<sup>11</sup> Or perhaps, as Bates proposes, the only formalities which should be required are:<sup>12</sup>

"that the will should be in writing, signed at some place by the testator, or by someone in his presence and under his direction, and attested by two witnesses on some part of the document."

The "threshold requirements" view, however, suffers from the criticism that if these minimal formalities are to be enforced with the same literalism as the extant ones then it will be questionable whether any progress has been made at all. To circumvent this likely attack, Bates, at least, chooses to support threshold requirements only as an alternative, for he goes on to adopt what appears to be a "broad approach" to the doctrine of substantial compliance as the other alternative.<sup>13</sup>

"If one or more of these formalities is not observed, then the court should nevertheless give effect to the true intentions of the testator as expressed in the document, in the absence of suspicious circumstances ... . The absence of formalities merely obliges the court to satisfy itself that there are no suspicious circumstances surrounding the making of the will ... . In any event the formalities must not be allowed to override the deceased's wishes."

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11. See the Law Reform Commission of British Columbia Working Paper @ pp. 67-8.

12. Op. cit. p.382.

13. Ibid..

Thus far would-be reformers are faced with four possibilities to adopt, namely:

- (1) the narrow approach of substantial compliance;
- (2) the broad approach of substantial compliance;
- (3) minimum threshold provisions; and
- (4) minimum threshold provisions coupled with a liberal discretion to give effect to the testator's intentions, notwithstanding a failure to comply with the minimum threshold requirements.

Yet another possibility lies in the question whether the rules of evidence ought to be relaxed in respect of wills. Statements made by a testator to others as to what he intends to constitute his will will usually be hearsay, and, therefore inadmissible unless they fall within the doctrine of res gestae. That doctrine requires the statement to be contemporaneous with the events in issue and imposes a limitation on the use of self-serving statements. Once, however, a document has been established as the deceased's, the deceased's intention with regard to it becomes relevant. At this point the deceased's statements before, at or after his making the document may be introduced as original evidence of his state of mind. In *Sugden v Lord St Leonards Mellish* L.J. said:<sup>14</sup>

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14. (1876) 1 P.D. 154 @ p.251.

"Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were."

If a remedial provision were to be adopted which placed reliance on the intentions of the testator then, it is submitted, the rules of evidence should be reconsidered in the light of that remedial provision. No overwhelming reasons would require the relaxation of the rules in such circumstances, however, as the rationale for the existence of the limits on the introduction of evidence would still obtain. There would, for example, still be no prospect of examining the testator; witnesses in such cases would still usually have a financial or emotional interest in the outcome and the problem of hearsay outside of the confines of the res gestae doctrine leading to fabrication and a multiplicity of issues would still be very real.

In this light it is suggested that Ormiston's advice not to relax the rules of evidence by statute<sup>15</sup>

"if the real vice being attacked is the rigour of the existing rules" [relating to execution of wills]

ought to be heeded.

Having thus canvassed the four main contenders for adoption to remedy some of the defects prevalent in the Wills Act legislation, it is now germane to examine how several jurisdictions have chosen to solve their own peculiar problems.

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15. Ormiston op. cit. @ p.456.

(i) The United States. In some states in America the approach of reducing the Wills Act formalities to a "threshold" level was adopted in the Uniform Probate Code of 1969. The Code requires only bare essentials for the proper execution of a formal will. The will must be in writing, signed by the testator or by some other person in the testator's presence and by his direction, and signed by two witnesses who witness either the signing or the acknowledgment of the signature.<sup>16</sup>

For holograph wills only the material provisions need be in the handwriting of the testator. Furthermore, the attesting witnesses provision is eliminated.<sup>17</sup>

Whilst this approach would rid the law of some problems (for example the *Re Beadle*,<sup>18</sup> *Re Stalman*<sup>19</sup> line of cases would no longer cause difficulty) circumstances can still be envisaged where strict adherence even to those formalities, should they be adopted here, would still operate to frustrate the testator's intention. For example, if the will was only witnessed by one witness. It is possible then that in the absence of fraud, forgery or coercion, the testator's intention might yet be defeated on a technical basis.

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16. Uniform Probate Code (1974) (official text) sec 2-502.

17. L.H. Averill, Uniform Probate Code in a Nut Shell (1978) @ pp.75 and 77.

18. [1974] 1 All E.R. 493.

19. (1931) 145 L.T. 339.

Therefore, whilst "threshold requirements" might rid the law of some of its imperfections, it is submitted that it leaves too many others which remain troublesome, for the same type of amendment to be usefully introduced into the law here.

(ii) Queensland. In 1978 in a report of the Law Reform Commission of Queensland On the Law Relating to Succession a provision was drafted for possible future inclusion in the Queensland succession laws.<sup>20</sup> The provision adopts Langbein's narrow approach to the doctrine of substantial compliance, and, in fact, was specifically seen and approved of by Langbein himself.<sup>21</sup>

The draft provision reads:<sup>22</sup>

"Will to be in writing and signed before two witnesses. No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that:

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20. Report on the Law Relating to Succession, Queensland Law Reform Commission No. 22 (1978), Appendix 5 (Draft) p.5., s.9.

21. *Ibid.*, p.7.

22. *Ibid.*, Appendix 5 (Draft) p.5, s.9.



- (a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and
- (b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument."

The Commission considered improving and clarifying the law by reducing the formalities required (as the Uniform Probate Code has done) but concluded:<sup>23</sup>

" ... we are satisfied that some formal requirements are necessary; and although sometimes the intention of testators is defeated, nevertheless, the existing law is in a fairly clear condition, having attracted a multitude of decisions."

Two comments require attention: first, that to express any kind of limited satisfaction that because most testator's intentions are not defeated by the formalities then the formalities are acceptable as they stand is to shy away from an attempt at a complete attainment of the rationale of the formalities. Such a stance, it is submitted, is neither laudable nor a firm base from which to work. Secondly, issue is taken with the view that the existing law is in "a fairly clear condition". Decisions discussed elsewhere in this chapter reveal that this is plainly not so.<sup>24</sup>

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23. Ibid., p.7.

24. See, for example, p.36 supra.

While the Commission rejected arguments in favour of "threshold formalities" the members were impressed by arguments which attacked the rigid attitude of the courts respecting compliance with those formalities.<sup>25</sup> To this end the provision requiring only substantial compliance was drafted. The explanation of the provision was couched thus:<sup>26</sup>

"We have ... decided to recommend that some relaxation in the court's standard should be permitted, and that provided substantial compliance is shown, and the court is satisfied that the instrument presented for probate represents the testamentary intention of the maker of it, the court may admit it to probate. It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance."

The major criticism of the Queensland proposal lies, it appears to this author, in the limitation of its approach. It only applies in cases where there has been a failed attempt to execute a will according to the prescribed formalities. But what of cases where the intention of the testator can be clearly ascertained although no "attempt" has been made to execute the will in accordance with the

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25. Op. cit. @ p.7.

26. Ibid..

prescribed formalities? For example, what of the will written on a paper bag by a lone adventurer in the high country? No gainful attempt could be made by the testator to find witnesses. And it is doubtful whether their omission would be classified as an "accident" or "minor departure" from the prescribed formalities.<sup>27</sup> Likewise, the omission of a testator's signature through his being too sick to sign would, if submitted, be a circumstance too difficult for the provision, as drafted, to overcome.

Support for this criticism can be found in the Manitoba Law Reform Commission which submits (on the subject of the Queensland provision) that:<sup>28</sup>

"... this form of provision unnecessarily limits the potential scope of the remedial doctrine, weakening its usefulness."

(iii) South Australia. In South Australia a remedial provision is already in force. In 1975 on a recommendation of the Law Reform Committee of South Australia<sup>29</sup> section 12 of the Wills Act 1936-1975 was introduced. It reads:

"s.12(1). A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.

27. Ibid..

28. Op. cit. @ p.22.

39. 28th Report of the Law Reform Committee of South Australia Relating to the Reform of the Law on Intestacy and Wills (1974) @ pp.10 and 11.

s.12(2). A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

A question discussed by Palk<sup>30</sup> is whether subsection 12(2) is to be interpreted broadly or narrowly. In other words, does some attempt at execution have to be made (the narrow approach) or not (the broad approach)?

Palk concedes that the broad approach is most certainly possible on the wording of the subsection.<sup>31</sup> The only criterion specifically required before the Supreme Court can validate the will is that there should be "no reasonable doubt that the deceased intended the document to constitute his will". To interpret those words to mean: "to demonstrate beyond reasonable doubt that the deceased intended the document to constitute his will he must have made an attempt at due execution" appears wholly unwarranted.

The comment is made, however, by the same author, that the narrow approach would seem to be the one envisaged by the Law Reform Committee of South Australia.<sup>32</sup> The

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30. Op. cit., pp.393-396.

31. Ibid. p.394.

32. Ibid..

Committee talks of "technical failure to comply with the Wills Act"<sup>33</sup> and "technical arguments as to the formal validity of wills".<sup>34</sup> Such statements would seem to imply, Palk argues,<sup>35</sup> something other than a total failure to comply with the Wills Act. And, he continues, there is no suggestion in the Report that they were seeking to promote any new modes of will-making.<sup>36</sup>

"The idea was to stop technical arguments in these cases reaching the court, and the only cases to reach the court are those where there has been a substantial performance of the formalities, so that a grant of probate is possible."

Having thus stated a case for both interpretations Palk takes the view that a narrow approach to s.12(2) would be a little hard to justify. He contends:<sup>37</sup>

"Why should an attempt to comply with the formalities of the Wills Act be the trigger that activates s.12(2) if the document can be defined as an attempted will without these formalities? Why read s.12(2) as saying that there can never be "no reasonable doubt" that the document was intended to be a will if there has not been a determined and substantial attempt to comply with [the formal requirements] of the Act, if s.12(2) simply does not say that?"

It is submitted that these rhetorical questions are extremely persuasive. The broad approach is manifestly

33. Law Reform Committee of South Australia Report @ p.10.

34. Ibid. @ p.11.

35. Op. cit. @ p.394.

36. Ibid...

37. Ibid. @ p.395.

possible on the words of the section and none of the arguments advocating the narrow approach are of sufficient weight to displace them. Other jurisdictions,<sup>38</sup> it is to be noted, seem to have assumed that the South Australians intended the statute to take the broad approach.

In the Working Paper of the Law Reform Commission of British Columbia, for example, the sole case to date in which a will was admitted to probate under the new law in South Australia is used to demonstrate that the view of the judiciary favours the broad approach to the doctrine of substantial compliance.<sup>39</sup>

The relevant case is *Re Graham*.<sup>40</sup> The facts were these: the testatrix signed her will and then gave it to her nephew with the request that he "get it witnessed". The nephew took the will to two neighbours who signed as witnesses in his presence but not in the testatrix's presence. The will was later returned to the testatrix by the nephew. Soon afterwards the testatrix died leaving approximately \$10,000 to her nephew in the impugned will. Clearly, the statutory requirements for the execution of a valid testamentary document had not been fulfilled: the testatrix had not signed the will in the presence of either witness, nor had either witness signed in the testatrix's presence. Could s.12(2) operate to save the will?

38. For example, British Columbia and Manitoba.

39. Report of the Law Reform Commission of British Columbia (1978) @ pp.51-52.

40. (1978) 20 S.A.S.R. 200.

The Court held that it could: s.12(2) of the Wills Act 1936-1975 was to be given a broad and remedial interpretation. As Jacobs J. said:<sup>41</sup>

"Upon these facts, I have not the slightest doubt that the deceased intended the document which is before me to constitute her will. Accordingly, if the words of s.12(2) of the Wills Act are to be given their plain and natural meaning, there is no reason at all why the document should not be deemed to be the will of the deceased, and admitted to probate as such, notwithstanding that it has not been executed with the formalities required by the Act."

This excerpt from the judgment of Jacobs J. finally settles the dispute as to the manner in which the judiciary in South Australia intend to interpret the provision. The words are to be given their "plain and natural meaning". Thus, in order to demonstrate beyond reasonable doubt that the deceased intended the document to constitute his will he need not have made an attempt at due execution. Elsewhere in the judgment of Jacobs J. further support for his view can be found:<sup>42</sup>

"... if there is one proposition that may be stated with reasonable confidence, it is that s.12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will ... ."

A second jurisdiction which has assumed that the South Australian approach embodies the broad view of the

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41. Ibid. @ p. 201.

42. Ibid. @ p. 202.

doctrine of substantial compliance is Manitoba.<sup>43</sup>

The Law Reform Commission of Manitoba describe the South Australian approach as "the widest in scope of all the remedial provisions in this area". The Commission submits that:<sup>44</sup>

"... this wide approach adopted in South Australia is the one which best achieves the goal of the remedial provision. By placing no limitation on the doctrine's application, it empowers a court to overcome any technical defect or absence of formality in giving effect to the testator's intention."

The South Australia provision is, it is submitted, the boldest step yet taken in any effort to make a testator's intentions effective, given that the rationale for the Wills Act formalities have been satisfied, despite the formalities themselves not being met. The introduction of the provision has clearly not resulted in the much-feared multiplicity of litigation. Nor have the formalities themselves lost their usefulness: the section is purely remedial - it does not effect a new mode of execution. The fact that a document which falls to be considered under s.12(2) must embody the "testamentary intentions" of the deceased person indicates that the purposes of the formalities must be complied with. That is, there must be sufficient evidence to establish authenticity, finality of intention and freedom from fraud or coercion. One method of proving this is by complying with the formalities. The importance of the South Austral-

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43. See Manitoba Law Reform Commission: The Wills Act and the Doctrine of Substantial Compliance pp.25-26.

44. *Ibid.* @ p.25.



ian provision, however, is that now this is not the only way. It is submitted that South Australia has made a considerable improvement in its law of succession: no longer will a judge be constrained, unwillingly, to conclude that a will cannot be upheld on a technical ground, despite the rationale for the existence of that technicality being clearly satisfied by the purported testamentary document.

A criticism of the South Australian provision lies in the requirement that the Court be

"satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

Proof to such a standard is that usually demanded in the criminal law. It is submitted that the civil standard of proof, that is, proof on a balance of probabilities would have been more appropriate. Two main reasons substantiate this view: first, it would retain a consistency not only with other areas of probate law but also with other areas of civil law. Secondly, the imposition of the higher standard in criminal cases is reflective of the serious consequences of a conviction - in many cases a loss of liberty. Such gravity seems incongruous in probate law. Both reasons, it is suggested, lean in favour of the civil standard being adopted by any jurisdiction following South Australia's model. And, indeed, in South Australia giving thought to the possibility of an amendment to its own legislation.

(iv) Israel. By section 25 of the Israeli Succession Law 5725-1965 the courts in that country have been able, since 1965, to admit to probate a technically defective will. Section 25 provides that:

"Where the court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure set out in sections 20 to 23 or the capacity of the witnesses."

The leading Israeli case on the application of this provision is *Briel v The Attorney-General*<sup>45</sup> decided in 1977. In that case the District Court had refused to grant probate even though it had no doubt as to the "genuineness" of the will. The will was in breach of the succession law in that it did not contain the date on which it was made. The Supreme Court allowed an appeal from the District Court's decision. The Supreme Court's judgment included these comments:<sup>46</sup>

"The question of all questions regarding the scope and operation of section 25 is always the 'genuineness of the will'. The court has to be first convinced, beyond all doubt, that it is indeed faced with a genuine will. Were it so convinced, the [formal] defects should not prevent it from granting probate of the will. Were it not convinced, even one defect requires it to abstain from granting probate."

And, further:<sup>47</sup>

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45. Israel C.A. 869/75 32 P.D. 98.

46. Ibid..

47. Ibid..

"The discretion granted to the Court by section 25 is a very wide one, and if there is no doubt as to the veracity of the will, there are three things only that cannot be remedied by section 25: the testator, two witnesses, and a document in writing."

These comments reveal certain sources of criticism in the Israeli legislation.

First, the standard of proof required is exceedingly onerous. In requiring that the court have "no doubt" as to the genuineness of the will the standard appears to be even higher than the usual standard applicable in criminal proceedings. Proof "beyond reasonable doubt", the usual standard in criminal cases, may result in "no doubt" being left in the mind of the court in any particular case - but it will not necessarily do so. To impose a standard which, prima facie at least, appears in excess of the usual criminal requirement will, if it has not already done so, severely limit the potential application of the section.

Secondly, although difficulties of language and law coupled with a scarcity of cases on the provision increase the complexities of determining its scope, it does not yet appear to have been established<sup>48</sup> whether section 25 is to be construed in accordance with the narrow or broad view of substantial compliance. In other words, must there be at least some attempt at execution complying with the formalities before the section can be invoked or not? It would appear from the emphasis in the section and

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48. See British Columbia Law Commission Working Paper 1978 p.55.

in *Briel's Case*<sup>49</sup> on the "genuineness of the will" that the paramountcy of that requirement would tend to favour the adoption of the broad view. And, certainly, as with the South Australia provision, the words of the section themselves can clearly accommodate the broad view. As a matter of interpretation it would, it is thought, be hard to justify<sup>a</sup> requirement that to bring a court to the state where it has "no doubt as to the genuineness of a will" an attempt at due execution would have to be made.

A third criticism of the section lies in the threshold requirements outlined in *Briel's Case*<sup>50</sup> which must exist before the section can be invoked in aid of a defective will. These threshold requirements comprise: a testator, two witnesses and a document in writing. Whilst most jurisdictions require a testator and a document, the requirement of two witnesses, if rigidly enforced, could be the vehicle which imports, under a remedial section, the potential for undue formalism. Given that any remedial section endeavours to reduce the number of wills struck down on technical grounds, once freedom from fraud, forgery and undue coercion have been proved, then it would appear almost paradoxical to provide in the section a requirement which could invoke the courts in such cases again.

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49. Supra pp.61-62.

50. Israel C.A. 869/75 32 P.D. 98 and see supra @ p.61.

Reducing the formalities in this way to a minimum threshold level does not, it is submitted, rid the law of the problem of wills brought down on mere technicalities. Even making so few demands limits the operation of the section for they are required to be satisfied in order to trigger the section into action.

These criticisms, it is submitted, are of sufficient substance to preclude any potential wholesale adoption of the Israeli experience into our legal system.

(v) British Columbia. In British Columbia the Law Reform Commission of that province recommended in its 1978 paper that:<sup>51</sup>

"The Wills Act be amended to permit the Supreme Court to admit to probate a document capable of having testamentary effect notwithstanding that it has not been executed in compliance with the required formalities if:

- (a) the instrument is in writing and signed by or on behalf of the deceased, and
- (b) the court is satisfied that the deceased intended the document to have testamentary effect."

This proposal clearly rejects the concept of attempted compliance. Instead, threshold requirements of writing and signature are preferred.

The British Columbia approach is wider than that taken in Queensland, and the threshold requirements are lower than those required by both the Uniform Probate Code

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51. Op. cit. pp. 67-68.

and the Israeli Succession Law. It is not, however, as broad as the South Australian provision.

The criticisms levelled at the Queensland, Uniform Probate Code and Israeli provisions requiring witnesses can be gladly omitted in a discussion of the British Columbia proposal. The possibilities of execution with, for example, a single witness, which could cause wills to be refused probate in those three jurisdictions, do not present insurmountable obstacles under the suggested provision for British Columbia.

Despite, apparently, paring the threshold requirements to an absolute minimum, even demanding writing and a signature is unnecessary in the view of the Manitoba Law Reform Commission. At page 23 of its report the Manitoba Commission comments:

"... circumstances can still be envisioned where strict adherence to even these minimal formalities could defeat the testator's intention. As Professor Langbein points out what of the testator who is about to sign his will in front of witnesses, when an "inter-loper's bullet or a coronary seizure fells him".<sup>52</sup> The likelihood of such an occurrence is small but the fact remains there is no necessity for such limitations to the proposed section. In effect such requirements do not conform with the functional analysis on which the remedial provision is based."

This, it is submitted, is a valid criticism. Although the proposal for British Columbia covers most of the difficulties currently encountered and hitherto discussed<sup>53</sup> (for example, position of signature, presence

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52. J. Langbein Substantial Compliance with the Wills Act (1975) 88 Harv. L.Rev. 489 @ 518.

53. Supra pp. 29-45.

of witnesses, number of witnesses) it still allows the possibility of a testator's intention failing to be realised for want of a formality.

For example, suppose a testator wrote out his will but then suffered a heart attack and died just as he began to append his signature. Or even before he attempted signing at all. In both sets of circumstances, on the British Columbia provision, the will would not be admitted to probate. But, equally, in both cases the testator's intention might be very clear: he meant to sign the document as his will but was prevented by a supervening disability. If the rationale of a reduction in the formalities is to effect, as far as possible, the legal embodiment of the testator's intention (in the absence of fraud, forgery and coercion) then, it is submitted, the principle demands freedom from the shackles of all formalities if there is a chance of those formalities operating to defeat the testator's intention in any given case.

An extension of this argument would favour the introduction of oral wills in other than privileged instances. But, to prevent abuse of such nuncupative wills, only, it is submitted, should they be allowed in in extremis situations, as previously discussed.<sup>54</sup>

Thus, although the proposal for British Columbia widens the remedial scope of the law by permitting, for

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54. Supra pp. 21-26.

example, signed holograph wills to be valid without witnesses, it is thought that the provision does not go far enough. A clear manifestation of intention by a testator, unaffected by extraneous factors, ought to be given effect to by the law - irrespective of whether all formalities have been complied with. And some consideration could have been given to the application of this principle in the field of oral wills - although, it is appreciated, several policy factors would serve to limit such a class of wills fairly rigidly.

(vi) Manitoba. At page 30 of the Manitoba Law Reform Commission Report, the Commission recommends that:<sup>55</sup>

"A remedial provision should be introduced in "The Wills Act" allowing the probate courts in Manitoba to admit a document to probate despite a defect in form if it is proved on the balance of probabilities, that the document embodies the testamentary intent of the deceased person."

This proposal is the most radical of the six discussed. It contains no threshold requirements, it does not demand any attempt at due execution and the Manitoba Commission envisages the relevant standard of proof being the normal civil standard, that is, proof on a balance of probabilities or on a preponderance of evidence.<sup>56</sup> This is in marked contrast to the South Australian provision

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55. "The Wills Act" and the Doctrine of Substantial Compliance."

56. Op. cit. p.27.



which required proof to show that there was;<sup>57</sup>

"no reasonable doubt that the deceased intended the document to constitute his will."

In other respects, however, the Manitoba Commission regards the South Australian provision as a blue print for its own. At pages 26 and 27 of the Report it is submitted that:

"... the wide approach to the remedial provision taken in South Australia is the optimal approach for such a section. The introduction of limitations defeats the purpose of the provision without serving any necessary function. Therefore, the majority of the Commission recommends that the remedial provision introduced in Manitoba should take this wide approach so as best to encompass all present and potential difficulties."

The wording of the proposed Manitoba provision is intended to be similar to that adopted in South Australia but amended to incorporate the altered standard of proof.

It is submitted that the Manitoba proposal is the most exciting and far-reaching of the six. Exciting in its possibilities: far-reaching in its unique scope. It takes the principle of giving effect to the testator's intentions the furthest of all the jurisdictions discussed. It is to be hoped that the provision is accepted and adopted into the law of Manitoba unaltered.

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57. s.12(2) Wills Act 1936-1975 (South Australia).

#### 4. CONCLUSION

The current formalities required to make a valid will and their inherent inadequacies have been discussed in this chapter. It has been seen that the rationale which spawned the formalities is often defeated by them. To reverse this trend various proposals have been put forward in several jurisdictions advocating the introduction of remedial provisions. These provisions have varied from those requiring most of the present formalities coupled with attempted due execution (as in Queensland) to those demanding solely the necessary "testamentary intentions" in a document (as in Manitoba). Which is the most preferable course for New Zealand law to follow?

It is submitted that the testator's testamentary intentions, insofar as they can be ascertained, ought to be given effect to by the law. Therefore, as long as a testator intimates his intentions free from fraud, forgery and undue influence, it should matter not at all whether he has complied with any threshold requirements of, for example, writing, signature and/or witnesses or not. Thus the South Australian statute and the Manitoba proposal are preferred to those of the Uniform Probate Code, Queensland, Israel and British Columbia. Manitoba's insistence on the civil standard of proof is more acceptable than South Australia's requirement "beyond reasonable doubt". Of the six, therefore, it is submitted that Manitoba's proposal makes the clearest and

least complicated attempt at giving effect to a testator's testamentary intentions.

The major drawback of the Manitoba approach (indeed of all the approaches discussed) is their insistence on the requirement of a document. But if true effect is to be given to testamentary intentions evinced by a testator should not oral wills be mentioned in discussion also? Granted, a wide definition of document could serve to validate some such wills. For example, the definition of document in the Evidence Amendment Act (No 2) 1980 includes<sup>58</sup>

- "(a) Any writing on any material:
- (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:
- (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:
- (d) Any book, map, plan, graph, or drawing:
- (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced."

Were a proposal similar to Manitoba's to be adopted into New Zealand law, and the aforementioned definition of document utilised, then testamentary intentions spoken into a tape recorder or evinced, for example, in deaf and dumb language could be valid. (Freedom from fraud, forgery and coercion would always have to be proved

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58. Evidence Amendment Act (No 2) 1980 s.2(1).

with evidence on the balance of probabilities going to the authenticity of the document and the testator's intention that it actually be testamentary.) Such a step would be far removed from our present vigorous insistence on the s.9 formalities. Not only would it validate some types of oral wills but also holograph wills currently not recognised by New Zealand probate law.

One problem not wholly solved by the adoption of such a solution would be that of oral wills. Oral wills, in certain circumstances, can be proved to contain an authentic expression of a testator's testamentary wishes. The possibility of widespread abuse of oral wills coupled with difficulties of proof have precluded such wills from being adopted as a general mode of will-making in most jurisdictions.<sup>59</sup> It is thought that these considerations would still not allow the general introduction of oral wills into probate law. However, it is submitted, that the acceptance of oral wills made in extremis in a situation of imminent death as a result of which the testator actually died would be a welcome improvement on the present situation.<sup>60</sup> It would not fully embody the principle of giving effect to a testator's intentions but it would, it is thought, go as far as policy factors might allow.

Thus New Zealand succession law can be seen to be deficient in its formalism, and its failure to recognise

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59. Although oral wills are generally recognised as privileged wills - see, e.g. Wills Amendment Act 1955 ss. 4-6 (N.Z.).

60. Supra p.22 for discussion of this type of will.

holograph wills and nuncupative wills. The introduction of a proposal similar to Manitoba's would remedy the rigid interpretation of s.9 and would allow holograph wills to be proved. The introduction of an in extremis provision might operate to save some genuine expressions of testamentary intent made free from fraud, forgery and undue influence and for that reason is advocated. These changes would better reflect the rationale behind the present Wills Act formalities.

In the two jurisdictions which actually have a remedial provision currently in force (namely, Israel and South Australia) it has not been the experience of either that litigation has increased.<sup>61</sup> Nor has it been the experience of either that a multiplicity of forms of wills has resulted. The provisions are remedial only. They do not provide a new method of execution: only a remedy for certain types of failures in complying with the formalities.<sup>62</sup> Neither the Courts nor the general system of administration of estates, therefore, appear to have been unduly upset by the introduction of these provisions in Israel and South Australia.

For those reasons, and because a remedial provision allows the Court to give effect to a testator's wishes

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61. British Columbia Working Paper pp.57-60.

62. Ibid..

when it is certain that the document is meant to be the last will of the deceased, it is submitted that New Zealand law ought to adopt a remedial provision. The advantages of adopting a proposal similar to that advanced by the Manitoba Law Reform Commission outweigh, it is thought, those of the other proposals. Its deficiency in not providing for oral wills made in extremis ought to be remedied in any proposal advanced or adopted for New Zealand. By opting for this course New Zealand probate<sup>law</sup>/will have made some long overdue and much-welcomed reforms to the well-nigh invincible Wills Act of 1837.

## CHAPTER II

## THE INTENTION REQUIRED TO EXECUTE A VALID WILL

## 1. INTRODUCTION

An instrument duly executed with all the formalities required by law may prima facie appear to be a valid will. That conclusion, however, could prove erroneous. For behind the instrument the requisite mental element must exist. To be valid as a will a document must not only comply with the necessary formalities: it must also be executed by the testator while in a mental state recognized by the law as being equal to the task. What amounts to such a sufficient state of mind can be ascertained from the judgment of Cockburn C.J. in *Banks v Goodfellow*.<sup>1</sup>

"... It is essential to the exercise of [the power of testation] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

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1. (1870) L.R. 5 Q.B. 549 @ p.565.

This definition has several facets. First, a testator must understand "the nature of the act and its effects". This does not mean that a testator need appreciate the precise legal effect of his wishes - simply their broad effect on his death.<sup>2</sup> Secondly, the deceased must have a recollection of the extent of the property of which he is disposing. He need not hold a detailed inventory in his head but must have a general idea of that which comprises his estate. Thirdly, as regards "the claims to which he ought to give effect", Sir James Hannen's statement in *Boughton v Knight* is apposite. A testator must have:<sup>3</sup>

"a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him."

A clarification of this third facet may be found later in the same case, where the learned judge reiterated that a will is not invalid merely because in making it the testator is moved by capricious, frivolous, mean or even bad motives. As long as he satisfies the aforementioned test he:<sup>4</sup>

"may disinherit ... his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride."

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2. Ibid. @ p.567.

3. (1873) L.R. 3 P & D 64, @ pp.65-66.

4. Ibid. @ p.66.



Thus the general requirements of testamentary capacity, or animus testandi, seem clear. In Cockburn C.J.'s classic summation in *Banks v Goodfellow*, a testator must:<sup>5</sup>

"... in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed and the disposition of his property in its simple forms."

Various factors might vitiate a testator's understanding of his will in any given instance. For example, he might suffer from insanity in which case he will usually not have the requisite animus testandi. However, he may have sufficient capacity if he is generally insane but experiences lucid intervals. In *Cartwright v Cartwright*<sup>6</sup> there was clear proof of habitual insanity, but there was also evidence that the will was made by the testatrix during a lucid interval. Consequently Sir William Wynne admitted the will to probate. Or, again, a testator might not be habitually

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5. (1870) L.R. 5 Q.B. 549 @ p.567 (quoting from the American case of *Harrison v Rowan* 3 Washington @ p.595).

6. [1793] 1 Phill. 90.

insane but, instead, suffer from delusions, or monomania, on a particular topic which affects the dispositions in his will. In *Dew v Clark*,<sup>7</sup> for example, a testator, in other respects sane when the will was made, had an insane aversion to his daughter, his only child. As a result the daughter was virtually completely excluded from her father's will. The court held that the delusions operated to vitiate the testator's mental capacity and, therefore, pronounced the will invalid. In other circumstances, weakness of faculties due to illness or old age have also denied a testator sufficient animus testandi to execute a valid will.<sup>8</sup>

Thus far, the situations precluding the existence of the requisite mental capacity have been connected with physical infirmity: insanity habitual or partial, or the effects of age on the faculties. These are, however, not the only circumstances in which the necessary testamentary capacity may be vitiated. Three other instances demand discussion here. First, where there is undue influence or fraud; secondly, where there is duress, and, finally, where there is a want of knowledge and approval.

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7. (1826) 1 Add. 279.

8. See, for example, *Battan Singh v Amirchand* (testator dying from tuberculosis. Held: so enfeebled by disease that he could not execute a valid will).

As regards undue influence: A will will be declared invalid if, although the testator knew what the contents were, he has been forced to make it because of influence exerted over him by someone else. Thus in a court of probate undue influence means coercion:<sup>9</sup> nothing short of mental coercion, destroying the testator's freedom of action is sufficient. The mere fact that the testator was persuaded by someone to make a will in a certain way, or has been continually bothered or harassed, is insufficient in itself. Nor is it sufficient that the other party was in such a relationship to the testator as would make it easy for him to be influenced. A will made in such circumstances will be valid as long as it can be shown that any behaviour of the other party stopped short of coercion. As Sir J.P. Wilde said in *Hall v Hall*:<sup>10</sup>

"Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator will constitute undue influence, though no force is either used or threatened."

As regards fraud: it differs from undue influence in that fraud misleads a testator whereas undue influence coerces him. For example, if a person

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9. Per Hannen P. in *Wingrove v Wingrove* (1885) 11 P.D. 81 @ p.82.
10. (1868) L.R. 1 P & D 481 @ 482. Comparative cases on this point comprise: *Bullock v Lloyds Bank* [1955] Ch.317; *Re Craig* [1971] Ch.95; *Boyse v Rossborough* (1857) 6 H.L.C. 2; *Tanner v Public Trustee* [1973] N.Z.L.R. 68; *Re Brocklehurst* [1978] 1 All E.R. 767.

falsely represents his own or another's character or conduct as being exemplary in order to inveigle his way into being an object of the testator's bounty then fraud will clearly be established. Many other types of fraud have been perpetrated: for example, by deceit preventing a testator from revoking a provision; deliberately misrepresenting personal circumstances so as to obtain a gift; deliberately impersonating another in order to benefit under a will.<sup>11</sup> A detailed examination of such cases are, however, not within the scope of this paper.

The second vitiating factor to be discussed in this section is duress. Testamentary intention is deemed to be overborne where a testator is compelled to make a will by force or threats of physical violence. The situation is similar where a testator wishes to alter a valid will but is prevented from doing so by force or threats by a person who stands to benefit from an unchanged will.

In such circumstances the court will declare that the beneficiary taking under the will holds his interest as trustee for the person who would have taken if the testator had done what he wished.<sup>12</sup> In other

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11. See, for example, *Allen v McPherson* (1847) 1 H.L.C.191 and *In the Estate of Posner* [1953] P.277.

12. See *Betts v Doughty* (1879) 5 P.D. 26.

words, the court will, as far as possible, give effect to the real intentions of the testator.

Finally, it is essential to the valid execution of any will that a testator knows and approves of its contents. A testator must know and intend to execute that which he does in fact execute. A want of either knowledge or intention will result in the document being refused admission to probate. Although the formalities of execution might have been complied with, it cannot be said that the requisite mental capacity was present if the testator either had no knowledge or intention to execute the document propounded as his will. The situation is similar where there is a want of knowledge and approval as regards some part of the document. Then the part in question will be excluded from probate. The rest of the document will be admitted to probate as long as it satisfies all the other relevant requirements.

Thus knowledge and approval in this sense involves two central aspects: the testator's intention which is not realised because of mistake.<sup>13</sup> These two concepts in turn raise further questions for discussion, namely: how do mistakes arise in this context? and what powers do the courts have in trying to correct them so that the

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13. While a want of knowledge and approval can arise for other reasons e.g. fraud and those canvassed at pp.76-79 supra, it is proposed to confine the central discussion to want of knowledge and approval in the field of mistake.

will reflects the testator's original intention to some extent at least?

An attempt will now be made to answer these testing questions, as it is submitted that this particular area of mental capacity is fraught with difficulty for both testator and courts alike and is long overdue for reconsideration and reform.

## 2. KNOWLEDGE AND APPROVAL

It has been demonstrated that, before a document can be admitted to probate, both the physical and mental elements of legal testamentary execution must be complied with. That is, the formalities required by s.9 Wills Act 1837 coupled with a knowledge and approval of the contents of the document in question. Having already discussed the various failings of the formal requirements,<sup>14</sup> what constitutes a want of knowledge and approval falls to be discussed here.

In general terms, a want of knowledge and approval means that the testator did not fully appreciate what he was executing. In other words, he executed something different to that which he intended to execute. In these circumstances the testator will not possess the

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14. See previous chapter.

necessary testamentary intention and the document cannot be admitted to probate: he cannot be said to have "known and approved of" the document at the time he executed it. Proving a want of knowledge and approval on grounds of mistake may, however, be difficult. This is because where a will appears properly executed in point of form then it will be presumed that the testator did know and approve of its contents. The following section deals in detail with the many problems on this point. It will suffice to mention here the two main exceptions to this general presumption.

First, in the case of blind, dumb or illiterate testators positive evidence is required to show that the will was read over to the testator before execution or that in some other way the testator had knowledge of its contents before it can be admitted to probate.<sup>15</sup> A statement to this effect should be included in the will.<sup>16</sup>

Secondly, suspicious circumstances prevent the operation of the presumption unless and until the grounds for suspicion are removed. For example, where a person has prepared a will and that same person takes

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15. See, for example, *In the Goods of Geale* (1864) 3 Sw & Tr. 431, (testator deaf, dumb and illiterate). *In the Estate of Holtam* (1913) 108 L.T. 732, (testator deaf, dumb and illiterate) and *Fincham v Edwards* (1842) 4 Moo.P.C. 198 (proof by other evidence than reading over may suffice).

16. See, for example, in England, the Non Contentious Probate Rules 1954 r.11.

a benefit under it, then, if the validity of the will is attacked, the presumption of knowledge and approval ceases to apply. Instead, the facts are taken to raise a suspicion that the beneficiary surreptitiously slipped the provisions in without the knowledge of the testator. That suspicion can only be removed by positive evidence of knowledge and approval. What amounts to "positive evidence" will vary with the circumstances of the case.

In *Wintle v Nye*<sup>17</sup> the whole of a testatrix's residuary estate (a substantial amount) was given, by the will, to the solicitor who had drawn it up. The plaintiff, Colonel Wintle, interested in the event of an intestacy, challenged the will on the ground of want of knowledge and approval. He eventually succeeded in the House of Lords, where Viscount Simonds said:<sup>18</sup>

"It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and zealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case the circumstances were such as to impose on the respondent as heavy a burden as can be imagined."

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17. [1959] 1 W.L.R. 284.

18. Ibid. @ p.291. And see *Barry v Butlin* (1838) 2 Moo. P.C. 480 @ pp.481-2 (Parke B.) and, more recently, *Re Stott (deceased)* [1980] 1 All E.R. 259 (where *Wintle v Nye* was applied).



A third situation, not strictly an exception to the presumption, but an exception to the principle that a testator must have full mental capacity when he makes his will, and, therefore, occupying a peculiar position in the law, is the rule known as the Rule in *Parker v Felgate*.<sup>19</sup>

The rule may be expressed thus: Where a testator gives instructions for a will at a time when he fully understands his actions and subsequently he executes a will prepared in accordance with those instructions, then, that will will be valid despite the fact that at the date of execution the testator is no longer capable of completely understanding the instructions or the provisions of the will giving effect to them but he does remember that he gave instructions and understands that he is executing a will carrying out those instructions.<sup>20</sup>

As Hannen P. put it in *Parker v Felgate* itself:<sup>21</sup>

"If a person has given instructions to a solicitor to make a will, and the solicitor prepared it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out."."

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19. (1883) 8 P.D. 171.

20. Ibid..

21. Ibid, @ p.173.

This principle was subsequently accepted in the Privy Council case of *Perera v Perera*<sup>22</sup> but, it is submitted that it is illogical and dangerous and that the law would be the better for its absence. The principle allows a testator to make a valid execution of a document when he is not fully aware of what he is doing: if he had been he might decide that the previous instructions ought to be altered. Such a manifestly unsatisfactory situation ought not to find a place in any reforms of this aspect of the law of succession.

It has already been mentioned<sup>23</sup> that a want of knowledge and approval can arise for various reasons: for example, fraud, duress, mistake. The following discussion, however, will only deal with the subject of want of knowledge and approval in connection with mistake. Two major reasons have prompted this course. First, the breadth of the topic. Cases of mistake have plagued the courts relentlessly over the last 150 years. The result, predictably perhaps, has been a mass of difficult case law. Secondly, proposed remedies for mistake tend to be peculiar to that subject. It demands, therefore, a certain amount of singular treatment.

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22. [1901] A.C. 354.

23. Supra p.80 and n.13.

### 3. MISTAKE

It has already been seen that the usual onus upon the propounder of a testamentary document to show that it was the subject of the testator's knowledge and approval is shifted once due execution has been proved.<sup>24</sup> In most cases of mistake, therefore, the challenger has a formidable task. To succeed he must establish, for example, that the document signed as the testator's will in fact contains unintended material. That is, that the testator's actual intention was not given effect to by the document propounded as his will: there was, therefore, a want of knowledge and approval as regards the will or some part of it.

If the challenge on the ground of mistake succeeds then the will or the parts which the testator did not know and approve of will be omitted from probate.

Difficulties in this area of the law revolve around two major points. First, the meaning of knowledge and approval. What amounts to knowledge and approval? Must a testator have actually read, absorbed and understood the legal phraseology employed by his draftsman in the drawing of the will? Or is it sufficient that he merely "glanced over" the document executed as his will? Principles in this area are difficult to discern. An attempt to reconcile the relevant cases has been said by

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24. Supra pp.81-83.

Latey J. to produce "intellectual gymnastics, if not acrobatics".<sup>25</sup> He continues by advising that not all the decisions and dicta are reconcilable.<sup>26</sup> With these warnings in mind an attempt at the interpretation of the relevant cases has, nevertheless, been undertaken. It is hoped, thereby, not only to achieve a clarification of the meaning given to "knowledge and approval" in this field but also to gain a better informed general view of an area which has caused, and continues to cause, considerable problems.

The second major point of difficulty involves the powers of the court of probate. Given that the will is shown not to reflect the testator's intentions how far can that court go in an attempt to remedy the situation? Again, as will be seen, inconsistencies in the cases are prevalent.

The confusing state of the law in this area has resulted in the Law Reform Committee in England recommending that the equitable remedy of rectification should be available to the court of probate.<sup>27</sup> The Committee further suggested that the court of construction should have wider powers to admit external or extrinsic evidence to ascertain a deceased person's intentions.<sup>28</sup>

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25. *In re Morris (deceased)* [1971] P.62 @ p.75.

26. *Ibid.*.

27. Law Reform Committee 19th Report Cmnd.5301.

28. *Ibid.*.

The powers of the court of construction are outlined in the next chapter.

The following classification of cases and the principles laid down therein are tentatively stated only. They highlight the obstacles encountered when it is contended that a testator's intentions are at variance with that which he has signed as his testamentary document. Of necessity, therefore, the court of probate's remedial powers, their limitations and inadequacies are discussed. Mention is also made of current proposals for reform, their relative merits and their prospects of success.

(i) Execution of the wrong document.

This situation usually arises where a testator, instead of executing the document prepared as his will, executes a document prepared as someone else's will, the documents being similar, if not identical, in form and substance. Can the document which the testator has signed be admitted to probate?

In England, on the authority of *In the Estate of Meyer*,<sup>29</sup> the answer appears to be in the negative. In New Zealand<sup>30</sup> and Canada<sup>31</sup> the opposite view has been taken.

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29. [1908] P.353.

30. See *Guardian Trust & Executors Company of New Zealand Ltd v Inwood* [1946] N.Z.L.R. 614 (C.A.).

31. See *Re Brander* [1952] 4 D.L.R. 688.

*In the Estate of Meyer* concerned two sisters who had each made wills and now wanted to make codicils in identical terms. Two codicils were therefore drawn up and placed before the sisters for execution. Unfortunately, however, by mistake, the sisters executed each other's codicil. It was held that neither document would be admitted to probate, Barnes P. stating:<sup>32</sup>

"But it is quite clear that this lady, though her signature is on the document, never meant to sign this particular codicil at all. She meant to sign a totally different document."

On principle, it is submitted that the decision in *In the Estate of Meyer* is correct. For a will to be valid it must be shown that the deceased intended to execute a will in the terms of the document put forward as his will. Thus, the testator must have intended to execute the very document which he signed. If, therefore, he signs a document similar, even identical, to that which he intended to sign that is insufficient: there is no animus testandi as regards a similar or identical document as the testator did not intend to sign that document.

In New Zealand, however, a contrary view has been taken. In *Guardian Trust & Executors Company of New Zealand Ltd v Inwood*<sup>33</sup> two sisters, Jane Remington and Maude Lucy Remington, executed each other's wills by mistake. In substance the wills were identical. The

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32. [1908] P.353 @ p. 354.

33. *Supra* n.30.

Court of Appeal admitted the will of the first to die (Jane) to probate with the omission of her sister's names (Maude Lucy) in the dispositive parts of the document. Fair J. @ page 623 said:

"True, the physical document was not the paper that the testatrix intended to sign, but it was a paper that contained everything that she wished included in the paper she intended to sign except the Christian names of her sister. She adopted it believing that it expressed her intentions in every respect. It does in most, and can be read as carrying out her intentions."

In this conclusion Fair J. dismissed the forceful argument of counsel opposing probate: an argument which embodied in lucid language the stance taken by the English courts in *In the Estate of Meyer*.<sup>34</sup>

"Jane Remington did not sign the paper with the intention of making the document her will ... . There is no significance in the fact that the document signed by Jane contained similar provisions to the one she intended to sign. It was not her will, although it had some similar features. She intended to sign the will she had seen and read as her own will, but the document she intended to sign was not signed, and her mind did not go with her signature to the other document. Consequently, the mistake of the testatrix destroyed her animus testandi ... . There must be an animus testandi involving knowledge of the contents of the document and intention to make it the will. Intention is not sufficient. Mistake like fraud, or duress, invalidates a will by removing the animus testandi. The plaintiff has confused this with a mistake in some disposition, which may be rectified, but the mistake here goes to validity of the whole

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34. [1908] P.353.

document . . . . This [the document signed]  
cannot be rectified, as it is not a will  
at all." 35

Neither Jane nor Maude Lucy Remington intended to sign the document prepared for the other. Had the documents not been drafted in similar terms, it is submitted that the Court of Appeal would have found no difficulty in refusing probate. This case did not involve a general intention to execute the very documents in question coupled with a mistake as to inclusion or exclusion of some part (the more usual type of mistake<sup>36</sup>). Instead, no intention existed to execute the documents in fact signed. But, because of the substantial uniformity of the terms of the documents it is suggested that the Court made an unwarranted and unjustifiable extension to the law of mistake in New Zealand in concluding that:<sup>37</sup>

"the document does express, as it was intended to, the real intention of the testatrix except for the omission of the two words "Maude Lucy" and the substitution for them of the word "Jane."

The court accordingly granted probate of the will signed by Jane with the omission of the word "Jane" from the body of the will.

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35. *Guardian Trust etc v Inwood*, supra @ pp.620-621 Hutchison arguendo.

36. See infra pp. 95-133 for a discussion of such situations.

37. *Guardian Trust etc v Inwood*, supra @ p.624 (Fair J.).



Although the result of the case gave effect to the testatrix's intentions as regarded the disposition of her property it is submitted that the route chosen to arrive at the decision is suspect. Had the court asked itself: Did the testatrix intend to execute the document which she in fact did execute irrespective of its contents? then the confusion would not have arisen. The answer to that question ought to have been in the negative and no further question ought then to have been asked about the similarity of the terms of the two documents.

*Inwood*, however, has been followed elsewhere in the Commonwealth. In the Canadian case of *Re Brander*<sup>38</sup> Wilson J. relied heavily on that New Zealand case in his judgment.

The brief facts of *Re Brander* were these: John and Margaret Brander had had their solicitor prepare for each of them a will leaving all of their respective property to the other and appointing the other executor. Through an error, however, John signed the will drawn for Margaret and Margaret signed the will drawn for John. John died first, and this case involved an application by his wife requesting that part of the words of the document be struck out (those referring to the husband John in the clause appointing the executor and naming the sole beneficiary) and a substitution made in each

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38. [1952] 4 D.L.R. 688.

instance with words appropriately describing his wife Margaret. Wilson J. granted the application, including the alterations requested. He said:<sup>39</sup>

"Any difficulty I might have in grappling with this matter is solved by the judgment in *Guardian Trust & Executors Co v Inwood* ... where the Court of Appeal for New Zealand was confronted with an almost identical problem and solved it by granting the relief here asked for."

But in the New Zealand case no request was made for the insertion of words, only deletion was asked for. Thus it is submitted that Wilson J. came to a questionable decision in two respects. First, neither John nor Margaret intended to execute the very document which they in fact signed.<sup>40</sup> Therefore the principle to be found in *In the Estate of Meyer* could (and arguably should) have disposed of the case by refusing admission to probate. Secondly, given, however, that *Inwood* was to be followed to the extent that the document was to be admitted to probate with words omitted, no basis is to be found in that case allowing a court of probate to insert words.<sup>41</sup>

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39. Ibid..

40. See *In the Estate of Meyer* supra, and *In the Goods of Hunt* (1875) L.R. 3 P & D 250 (probate refused when two sisters mistakenly signed each other's will).

41. The Court of Probate has long exercised jurisdiction to exclude from a will upon admission to probate words inserted by way of mistake within the limits laid down in *Re Horrocks* [1939] P.198. And see *Morrell v Morrell* (1882) 7 P.D. 68; *Re Boehm* [1891] P.247; *Rhodes v Rhodes* (1882) 7 App. Cas. 192.

The decision in *Re Brander* has been described by one Canadian commentator as:<sup>42</sup>

"... eminently wise and sensible. There is no doubt as to the testamentary intentions of the testator. They were reduced to writing in proper form and he thought he was executing them as his will. He did execute a document in the form of a will and he had it properly witnessed as his will."

Whilst this writer agrees that in both *Brander* and *Inwood* the testamentary intentions of the testator and testatrix were clear, it is objected that that alone cannot circumvent the current legal requirement of animus testandi directed towards the actual document signed as the testator's will. Until a change in the law allows the testator's ascertained intentions to override his physical act in the case of signing the wrong will then it is suggested that the *Meyer* approach ought to be adhered to.<sup>43</sup>

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42. Case and Comment 31 Can. B.R. 185 @ p.187 (Gilbert D. Kennedy).

43. Theobald on Wills states that despite the wrong paper being executed by mistake if the essential elements of execution as a will have been fulfilled and the testamentary intentions established beyond doubt, and all the testamentary gifts can be given effect to by the striking out of inapt words, the paper so amended may be admitted to probate; as the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. This, it is submitted, is correctly viewed as a concession to the common law rules, not as a statement of them. Reform of the rules themselves would obviate the necessity for such compromises.

- (ii) Clerical slip made by testator while drafting his own will.

If words are inserted in a will by a mere clerical error by a testator drawing his own will then they will be omitted from probate. This is because the testator did not intend the words to form part of his will: the mind of the testator did not advert to the presence of the words and then consciously authorise their inclusion in the document signed as his will. On the contrary, in most cases the testator in question will not even know that the words are there. Therefore, the courts have been reluctant to ascribe knowledge and approval to the words inserted by the draftsman's own clerical error in his home-made will.

In the case of *Re Swords*,<sup>44</sup> for example, a testatrix herself drew up a codicil amending her will. In the codicil she referred to the wrong clauses of her will: she had intended to refer to "clauses 2, 3 and 4" of her will but in her codicil referred to "clauses 3, 4 and 5". The mistake had occurred through the testatrix's reference to an old draft of her current will rather than the will itself. It was held that this was similar to a clerical error, and the inadvertant references were omitted from the probate.

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44. [1952] P.368.

The more recent case of *In re Phelan*<sup>45</sup> demonstrates the application of the relevant principles even more clearly.

In that case the testator executed a home-made will on the 10th of June 1968. That will contained a legacy and a gift of residue. On July 29th 1968 he executed three further wills which dealt only with different blocks of specific assets. The documents were not inconsistent. The problem, however, was that each of the July wills was made on a printed will form containing a clause which purported to revoke all previous wills made by the testator. On an application by the sole surviving executor for a grant of probate of all the wills, it was held that all four wills could be admitted to probate. Although the testator had signed printed will forms containing revocation clauses, he had not adverted to those clauses: it was as if they had slipped in by clerical error. Stirling J. stated the relevant law:<sup>46</sup>

"... although a testator who has executed a will, which prima facie he has read, if he is of competent mind must be taken to know and approve what he executes, and that would include, of course, a revocation clause, there is no presumption of law; it is merely a grave and weighty circumstance to consider, and if the obvious facts militate against such an intention as expressed in the document the court can act upon the real intention as found by the

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45. [1972] Fam. 33.

46. Ibid. @ p.35.

court. It can do so in this case (and there is authority for it) by omitting certain words. The court cannot, of course, remake a will for a testator but it can omit words which have come in by inadvertance or by misunderstanding if their omission gives effect to the true intentions of the testator as found by the court."

*In re Morris (deceased)*,<sup>47</sup> a judgment of Latey J., was relied on heavily in *In re Phelan (deceased)*. The more flexible and realistic approach to giving effect to ascertained testamentary intentions, which characterised *In re Morris (deceased)*, is to be found in *In re Phelan (deceased)*. Despite the testator in *In re Phelan (deceased)* having signed three wills with revocation clauses (because of inadvertance or misunderstanding) the court was prepared to depart from the prima facie inference of knowledge and approval. It is submitted that it is a point of some note that the revocation clauses in question were not written by the testator himself. If they had been it would have been extremely difficult to establish that he had not adverted to their presence irrespective of whether he realised their significance.<sup>48</sup> In such circumstances their inclusion could not be termed a "clerical slip": the mere result of absent-mindedness on the part of the testator. Any attempt, therefore, to have them excluded from the probate would have to be considered under another head of mistake.

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47. [1971] P.62.

48. Compare *Collins v Elstone* [1893] P.1.

- (iii) Clerical slip made by draftsman to whom testator has delegated the task of drafting his will.

The cases on this topic are legion not only in number but also in result. As such, principles are difficult to ascertain. Despite this, an attempt at a basic principle follows: If a draftsman has been instructed by a testator to draw up his will, and that draftsman introduces words contrary to his instructions by clerical error, then the testator is not bound by the mistake unless the very words are brought to his notice and he adopts them as his own before the execution of the will.

A testator, usually bound by his draftsman's work, is not so bound where the draftsman acts outside the scope of his authority. By introducing words contrary to the testator's instructions the draftsman has exceeded his authority. And no general rule imputes knowledge and approval to the testator in all circumstances where a testator has instructed a draftsman to draw up his will. In most cases, therefore, the question for the court to determine is whether the testator has acknowledged and approved of the draftsman's work, including his clerical error(s), thereby in effect, making the error(s) his own.

What amounts to knowledge and approval in this area is a vexed question. However, several statements can be made with a degree of certainty.

If a draftsman makes a clerical error in the will, and that will is not read by or read over to the testator before execution then the testator cannot be said

to adopt the draftsman's mistake. In *Morrell v Morrell*<sup>49</sup> a draftsman inadvertantly inserted the number "40" instead of the number "400" before a gift of shares from a testator to his nephew. The will as drafted was engrossed and executed by the testator. It was not read over to the testator, nor did he read it himself. It was clear, therefore, that the testator did not know that "40" had been written instead of "400". The court held that the 40 ought to be omitted from the probate so that effect could be given to the testator's intention: he intended to leave all his shares in that company to his nephew and all his shares amounted to "400". Thus the omission gave effect to "the true intentions of the testator as found by the court".<sup>50</sup> Similarly, in *In the Goods of Schott*<sup>51</sup> the testator executed his will which contained, by mistake, the word "revenue" instead of "residue". The error appeared in the dictated draft will and the engrossment. The court heard evidence that, insofar as it was possible to ascertain, neither the draft will nor the engrossment was read over to the testator. And the discrepancy between the instructions and the will as executed was not brought to his notice. Jeune P. therefore held that the word "revenue" be omitted from the probate copy of the will: the testator had not adverted to the existence of the word and could not be held to have adopted it as his own. In his

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49. (1882) 7 P.D. 68.

50. See n.46 (*In re Phelan*).

51. [1901] P.190.



judgment Jeune P. disapproved of the practice advocated by Sir Charles Butt in *In the Goods of Bushell*<sup>52</sup> and later in *In the Goods of Huddleston*<sup>53</sup>.

In *In the Goods of Bushell* a draftsman's clerical error caused the word "British" instead of the word "Bristol" to appear in a will which the testator signed without reading it over. It was held that the word "British" ought to be struck out for want of knowledge and approval. Thus far the decision is unobjectionable. However, Sir Charles Butt then sanctioned the insertion of the word "Bristol" in its place. In so doing he exceeded the powers of the court of probate which are limited to striking out. As Jeune P. commented at p.192 in *In the Goods of Schott*:

"I am afraid that it must be admitted that upon this point of probate practice the late Sir Charles Butt was heretical."

A similar point of probate practice was raised a few years later in the case of *In the Goods of Sir J.E. Boehm*.<sup>54</sup> In that case a draftsman, by a clerical error, inserted the name of one intended beneficiary (Georgiana) twice whilst omitting the name of another intended beneficiary (Florence) altogether. The will was not read over to the testator at any time, and the error was not brought to his notice. It was held that probate might be

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52. (1887) 13 P.D.7.

53. (1890) 63 L.T. 255.

54. [1891] P.247.

granted to the executor with the omission of the name "Georgiana" where it appeared for the second time.

Jeune J's difficulty in arriving at this conclusion involved a realisation that in all the cases cited to him in argument:<sup>55</sup>

"... to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word Georgiana and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under the circumstances."

But he went on to opine:<sup>56</sup>

"... that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions."

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55. Ibid. @ p.250.

56. Ibid. @ p.251.

The court of probate's power to strike out raises problems common to all the categories of mistake. It will therefore be discussed after this classification of cases has been completed.

At this juncture it is pertinent to note that New Zealand courts have also had cause to consider this area of law. In *In Re Smith (deceased)*<sup>57</sup> for example, a draftsman's clerical error included in the will a phrase which the testator had intended to be omitted. ' Before execution the testator did not read over the will and it was not read over to him. Henry J. held, consistently with the line of authority just discussed, that the testator could not be held to have knowledge and approval of the phrase and that it ought, therefore, to be omitted.

An issue of a like nature was raised by the case of *Re Whyte (deceased)*.<sup>58</sup> In that case a testatrix left two wills, one made in 1945 and the other in 1968 shortly before her death. Her instructions were that the later will was to contain the same provisions as the earlier will except for the substitution of a new alternative trustee. Inadvertently a provision of the earlier will devising and bequeathing the whole estate to her husband was omitted from the later will. The testatrix duly executed the 1968 will but it was not

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57. [1956] N.Z.L.R. 593.

58. [1969] N.Z.L.R. 519.

read over to her prior to her signing it. McGregor A.C.J. held that, on the evidence, the testatrix did not read her will over or have it read over to her, that she therefore had no knowledge and approval of its contents and that it would therefore be declared invalid. At page 520

McGregor A.C.J. summarised the relevant law thus:

"It is essential to the validity of a will that the testator should know and approve of its contents: *Guardhouse v Blackburn*.<sup>59</sup> Ordinarily, unless suspicion attaches to the document, the testator's execution is sufficient evidence of his knowledge and approval, but if the manner in which the will was read over is called in question, or if the will was not read over, the bare presumption may be rebutted: *Garnett-Botfield v Garnett-Botfield*;<sup>60</sup> but the clearest evidence is required: *Gregson v Taylor*.<sup>61</sup> The party propounding must prove affirmatively that the testator knew and approved of the contents. The Court cannot supply words omitted from the will by mistake or correct an obvious mistake.

In the present case I am satisfied, and it is accepted, that at the time of the execution of the later will the testatrix did not know and approve of the contents thereof... ."

This case seems to take the established principles to their outer limits. Here the clerical error concerned an omission, as opposed to an inadvertant insertion: the courts having no power to insert words<sup>62</sup> prima facie there is little a court would seem able to do. However, the

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59. (1866) L.R.1 P & D 109; [1861-73] All E.R. Rep.680.

60. [1901] P.335.

61. [1917] P.256.

62. See following chapter.

judge found that the testatrix had no knowledge and approval at all of her will which she had signed. The result by holding the second will invalid was much more nearly to give effect to the testatrix's original intentions.

The principle established by these cases from both England and New Zealand thus seems clear: A draftsman's clerical error in a will which is not read over to or read over by the testator prior to execution will not be deemed to be adopted by that testator, and will, accordingly, be omitted from the probate copy of the will. (Although, as mentioned previously, the latter point is not without its own difficulties which are discussed later.)

It can readily be seen from the cases, and from the principle itself, that evidence establishing the exact sequence of events prior to execution may be of the utmost importance. Whether the will was read over or not may result in the application of very different legal doctrines.

Where a will containing a draftsman's clerical error has been read over to a testator prior to execution the law is more complicated. In the case of *Guardhouse v Blackburn*<sup>63</sup> Sir J.P. Wilde reiterated the following rules in relation to the subject of knowledge and approval:<sup>64</sup>

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63. (1866) L.R. 1 P & D 109

64. Ibid. @ p.116.

"First, that before a paper so [i.e. duly] executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved of the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole."

The fifth rule is of particular import to this discussion. From it, it appears that Sir J.P. Wilde understood that the reading over to or by a testator of his will provided, in the absence of fraud, conclusive proof of knowledge and approval of the contents of the will by the testator. Thus no evidence, however forceful, could be received once it had been proved that a testator had either read over his will or had it read over to him. But testators do not all read their wills closely and carefully: some do so by what amounts to no more than a glance. Thus it seems iniquitous that the same amount of knowledge and approval was to be imputed to each.

It was to be 11 years before the rule came before the House of Lords. In the interim it was followed in *Atter v Atkinson*<sup>65</sup> and in *Harter v Harter*.<sup>66</sup>

The rule came before the House in 1875 in *Fulton v Andrew*<sup>67</sup> (an appeal from a decision of Lord Penzance, formerly Sir J.P. Wilde). Lord Cairns L.C. considered the rule, which Sir J.P. Wilde had purported to lay down in *Guardhouse v Blackburn*,<sup>68</sup> thus:<sup>69</sup>

"It is said that it has been established by certain cases ...., that in judging of the validity of a will or of a part of a will, if you find that the testator was of sound mind, memory, and understanding, and if you find, further, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the Legislature has, in the shape of an Act of Parliament, distinctly imposed that rule."

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65. (1869) L.R. 1 P & D 665.

66. (1873) L.R. 3 P & D. 11.

67. (1875) L.R. 7 H.L. 448.

68. *Supra* p. 103.

69. *Fulton v Andrew* (1875) L.R. 7 H.L. 448 @ pp.460-461.

Lord Hatherley agreed, commenting on the supposed existence of a rigid rule<sup>70</sup>

"... by which, when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all farther inquiry is shut out. No doubt those circumstances afford a very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will.... One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed."

Both learned judges therefore acknowledged the very real dangers of the imposition of such a rule where a testator has read his will over, or had it read over to him. Since "reading over" was not (and has not been) defined to mean "thoroughly appraising the testator of any alterations, insertions, omissions etc" it could wreak injustice, in some cases, to adhere to such a rule. Different testators deal with their wills in different ways: some like to study them in detail, reading them over meticulously; others prefer to have as little to do with them as possible, often relying heavily on a draftsman

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70. Ibid. @ p.469.



although "reading the document over", in the sense of scanning through it briefly, themselves. The importance of *Fulton v Andrew* is that it allowed each case to be dealt with on its own peculiar facts whilst still recognising (in the form of a presumption) the important act accomplished by a testator in reading over (or having read over to him) and appending his signature to the document he intended to constitute his will. Permitting evidence to be adduced to disprove knowledge and approval, despite the document having been read over and signed by the testator as his will, was a major step on the road to recognising the testator's intentions as being of paramount importance in probate cases. The end of that vista, almost a century later, has been brought within sight by the case of *In re Morris (deceased)*.<sup>71</sup>

In the hundred years separating *Fulton v Andrew* and *In re Morris (deceased)* the law on this subject suffered various vicissitudes.

Many problems, it is submitted, arose from confusion over the courts' powers,<sup>72</sup> but others stemmed from a failure to isolate different types of mistake, and the relevant principles pertaining to them. Brief reports did not ameliorate the situation. A case in point is *In the Goods of Walkeley*.<sup>73</sup>

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71. [1971] P.62.

72. For example see *In the Goods of Bushell* (supra).

73. (1893) 69 L.T. 419.

In that case a will was engrossed from a draft approved by the testatrix. The engrossment clerk copied the number of one house twice over, and omitted the number of another house. The will was in fact read over to the testatrix, but the clerical error was not discovered until after her death. The Court struck out the duplicated number and granted probate of the will with a blank space in its stead. It refused to insert the correct number into the space.

Jeune P. dealt with only two cases in his very short judgment: namely *In the Goods of Boehm*<sup>74</sup> and *In the Goods of Bushell*.<sup>75</sup> Both these cases concerned situations where the will was not read by, or read over to, the testator immediately prior to execution. It has been seen that the general principle in such cases operates to prevent the testator adopting the draftsman's mistake.<sup>76</sup> However, the law is otherwise where a will has been read by (or read over to) a testator before he signs.<sup>77</sup> While it is not contended that Jeune J's decision was in any way wrong, this failure to deal with why the testatrix did not have knowledge and approval of her will although

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74. [1891] P.247.

75. (1887) 13 P.D.7.

76. Supra p.99.

77. Supra pp.102-105.

it was read over to her and she had signed it does not aid in any attempted simplification of an already complex area of law. In that case he merely stated that:<sup>78</sup>

"... the engrossment was read over to the testatrix but the mistake in the numbers of the houses was not noticed, and the testatrix executed the engrossed copy."

Presumably each case "turns on its facts", as Lord Hatherley suggested in *Fulton v Andrew*<sup>79</sup> whilst refraining from establishing any guidelines, basic or otherwise. That certainly appeared to be the view taken by Jeune P. in *Brisco v Baillie Hamilton*<sup>80</sup> @ p.237:

"No doubt, if it can be proved that a will has been really brought to the mind of a testator or testatrix, and has been duly executed, it is difficult - perhaps impossible - in law to hold that anything contained in the will is a mistake. But, as was pointed out by the House of Lords in *Fulton v Andrew*,<sup>81</sup> the question is still left open whether the will was or was not really brought to the notice of the testator or testatrix. That question is a question of fact depending upon the circumstances of the particular case."

In *Vaughan v Clerk*,<sup>82</sup> another case before the same President of the Probate Division in the same year, the word "real" was, by a "mere mechanical clerical error", inserted instead of the word "said" in a will.

It is unclear from the report of the case whether the will was read over to, or by, the testator prior to execution. It is also difficult to ascertain what type of

78. *In the Goods of Walkeley* supra @ p.419.

79. See n.70 supra.

80. [1902] P.234.

81. See n.67 supra.

82. (1902) 88 L.T.144.

evidence allowed the court to find an absence of knowledge and approval and therefore enabled it to strike out the word "real" from the will. The report in its entirety reads:<sup>83</sup>

"The President said that he had not the slightest doubt, after the evidence had been given by Mr Matthews [the testator's solicitor] and the clerk who made the engrossment, that the word "real" had crept into the will by mistake, and that the word "said" had become "real" in the process of copying from the draft. The mistake was an obvious one. The word "real" would therefore be struck out, and that would give effect to the wishes of the testator, but the word "said" could not be substituted. The original grant of probate would be revoked, and a fresh grant with the word "real" omitted, would be issued. The costs of all the parties to the suit as between solicitor and client would come out of the estate."

*Vaughan v Clerk* was followed in 1912 in New Zealand in *In re Cogan (deceased)*<sup>84</sup> with the result that a clerical error was rectified by the omission of a word from the probate copy of the will.

Another New Zealand case worthy of note is *In re Warrington (deceased)*.<sup>85</sup> There, the word "not" was inadvertently inserted by the draftsman, at the engrossing of the draft will, after its approval by the testator. Its presence was not noticed at the reading over and execution of the will. Denniston J. held that the word "not" would be omitted from the probate copy of the will.

83. Ibid. @ p.145.

84. (1912) 31 N.Z.L.R. 1204.

85. [1917] N.Z.L.R. 124.

The three cases followed in that case (namely, *Vaughan v Clerk*, *In the Goods of Bushell* and *In the Goods of Schott*)<sup>86</sup> concerned situations where the will was not read over prior to execution (although, as noted above, in *Vaughan v Clerk* the relevant sequence of events is unclear). However, as in *In the Goods of Walkeley*<sup>87</sup> it is not easily explicable just why, despite a reading over to the testator before he appended his signature, he was not deemed to have knowledge and approval of the will as he signed it. The subject is treated cursorily in the report:<sup>88</sup>

"The solicitor does not remember reading the will over to the testator, but is satisfied he followed his usual practice in doing so. It is, however, clear that the error was not noticed either on comparing the engrossment or when read."

Thus, while it is evident from *Fulton v Andrew*<sup>89</sup> that reading over prior to signing does not automatically imbue the testator with knowledge and approval of all the subject-matter of the will yet it does, in Lord Hatherley's words "afford a very grave and strong presumption"<sup>90</sup> that the will was properly executed. The major criticism of cases such as *In the Goods of Walkeley* and *In re Warrington (deceased)* lies, it is submitted, in their failure to record their reasons for displacing the

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86. Supra n.82, 75 and 51 respectively.

87. Supra n.73 and see p.106 supra.

88. Per Denniston J. @ p.126.

89. (1875) L.R. 7 H.L. 448.

90. Ibid. @ p.469.

presumption and allowing words to be omitted for want of knowledge and approval. Possibly the principal reason is to be found in a fear of establishing too rigid a line of precedent which might detract from the courts' ability to come to each case unhindered by previous decisions and to deal with each in an individualistic vein. Whatever the merits and likely utilisation of this argument, giving very little (if any) indication of the evidence required to shift the presumption of knowledge and approval after proof of due execution is not helpful to potential litigants or their advisers. The latter, in face of few statements on the subject from the judiciary, usually must advise litigation in order to discover the courts' stance: the theory of stare decisis holding firm but its practical application distinctly lacking. Fortunately not all cases have maintained such a silence. From those that explain why the presumption of due execution has failed to attribute knowledge and approval to any given testator it is possible to piece together a very much more distinct picture of the workings of the law in this field.

In *Tartakover v Pipe*<sup>91</sup> the testator's will was prepared by his draftsman in a hurry, and, owing to a mistake on his part, or on the part of the typist, the will did not express correctly the testator's intentions as to the disposal of his estate. (The word "real" was included in the document by a clerical mistake.) After

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91. [1922] N.Z.L.R. 853.

the will had been typed the draftsman did not read it himself, and it was not read by anyone to the testator. Instead, the draftsman handed it to the testator who "looked at it" and signed it. The question for the court was: Could "looking at" the will amount to reading it for the purposes of establishing knowledge and approval on the part of the testator? Sim J. @ p.855:

"In the present case the will was not read to the testator, and Mr Dougall [the draftsman] does not say that the testator himself read it over. He looked at it, he said, and then signed it. I am satisfied that the testator's mind could not have been directed to that portion of the will in which the gift to his wife was limited to his real estate. If he had known that the gift was limited in this way he certainly would have objected to it, and would have refused to sign the will. The instructions to the solicitor must have been to prepare a will giving the whole estate to the wife. The restrictive word by which the testator's intention was defeated was introduced per incuriam by a mere clerical error on the part of the draftsman or his typist, and the testator is not bound by the mistake unless the restrictive word was directly brought to his notice ... . This was not done in the present case, and the testator, therefore, was not bound by the mistake."

The word "real" was, therefore, struck out of the will with the comment that:<sup>92</sup>

"This does not leave the will in the exact form in which it would have been if Mr Dougall had expressed correctly the testator's intentions, but that, I think, does not matter so long as the omission enables the will to give effect to those intentions."

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92. Ibid. @ p. 856.

Thus, merely "looking over" a will prior to signing it did not amount to a sufficient "reading over" such that knowledge and approval was established on the part of the testator. Or, if it did amount to a reading over it was of an insufficiently attentive nature to attract knowledge and approval.

*Tartakover v Pipe*, therefore, went a step further than the cases in which wills were not read, or looked at, at all by testators prior to signing. Here the testator did glance at it and read it in the loose sense of "skimming through it". Nevertheless, the court was satisfied that the terms of the will as executed were never really brought home to the testator and that, therefore, it was justified in striking out the word "real" which had crept in unnoticed and unauthorised.

Reading in the sense of "casting an eye" over the will before execution failed to cause the presumption of knowledge and approval to operate in *Un re Morris* (deceased).<sup>93</sup>

The facts of that case were these: By clause 7 of her will a testatrix gave several pecuniary legacies including one to a resident employee, Winifred Hurdwell, which was contained in subclause (iv) of clause 7. Miss Hurdwell also benefitted under clause 3 of the will.

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93. [1971] p.62.



Later, the testatrix wrote to her solicitor informing him that she wished to revoke the provisions relating to Miss Hurdwell (and substitute others) but that she wanted no other change in the will. The solicitor, therefore, drew up a codicil which included the words "I revoke clauses 3 and 7 of my said will". That provision plainly contained a clerical error which the solicitor's clerk noticed and corrected to read: "I revoke clause 3 and sub-clause (iv) of clause 7 of my said will". Unfortunately, the solicitor changed the codicil back to contain his original formula, that is "I revoke clauses 3 and 7 of my said will".

The testatrix executed the codicil after, as Latey J. found, having "read it in the sense of casting her eye over it"<sup>94</sup> but without really taking in its effect:<sup>95</sup>

"That the engrossment effected what in fact it effects she never knew - it never registered on her consciousness - it was never within her cognisance - to mention some of the phrases which have been used in this context. If she had known she would never have approved and never have executed."

Thus, Latey J. held, following dicta in *Fulton v Andrew*, that there was no rigid rule that a testator who has read his will before execution must be conclusively taken, in the absence of fraud, to have knowledge and approval of its contents. Even although a will has been read or

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94. Ibid. @ p.74.

95. Ibid.

read over inadvertance might still exist to deny knowledge and approval. In each case it will be a question of fact to be established by the available evidence.

Latey J. also held that no general principle existed whereby a testator had knowledge and approval imputed to him by being automatically bound by all words used by his draftsman. This aspect of the decision is discussed later.<sup>96</sup>

Having reached these conclusions, the judge reiterated that where there was an absence of knowledge and approval (for example, because of mistake, as in this case) then the law was clear: the court had no power to rectify by adding words to the instrument.<sup>97</sup> However, it had the power to do what it could by omission.<sup>98</sup> In this case a simple omission would not give immediate effect to the testatrix's erstwhile intentions, as in most of the cases reviewed hitherto. Nevertheless, the judge decided that the course which came the closest to giving effect to the testatrix's dispositive intention involved the omission of the numeral 7 from the codicil. At page 81:

"I cannot add the numeral (iv) after 7 but if 7 is excluded, clause 1 of the codicil would read as follows: "1. I revoke clauses 3 and of my said will"."

It was thus left to the chancery court as the court of construction to deduce from the will and the codicil, as altered, read together that the testatrix's intention was

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96. *Infra* @ pp.135-139.

97. *In re Morris (deceased)* @ p.75.

98. *Ibid.* @ p.81.

that after the words "clauses 3 and " should be the numerals 7(iv).

In this alteration to the probate copy of the will it can be ascertained that the jurisdiction to exclude words from probate is carried to a point well beyond its previous limits. In the earlier cases, the words struck out were words which had got into the will by accident and which the testator never intended to be there.<sup>99</sup> In *In re Morris*, by contrast, the words ordered to be struck out were in the will with the full knowledge and approval of the testatrix; what happened was that their meaning was modified by the accidental omission of other words.

A similar type of mistake came before Templeman J. in *In re Reynette-James (deceased)*.<sup>1</sup> In that case a solicitor's secretary, in typing out an engrossment of a draft will, approved by the testatrix, inadvertently omitted words in Clause 10 which contained an absolute gift of the capital of the residue in favour of the testatrix's son, Michael. The clause as read gave life interests to the testatrix's sister, Mrs Wightman, and a friend, Miss Pedley; then ought to have followed the part in fact omitted; and, finally, there were reversionary gifts in favour of Michael's wife and children in the event of Michael not surviving either Mrs Wightman or Miss Pedley.

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99. See, for example, *Re Boehm* [1891] P.247 and *Re Schott* [1901] P.190.

1. [1976] 1 W.L.R. 161.

The omission went unnoticed by everyone concerned, including the testatrix, to whom the engrossment was read, until the executor asked the court to pronounce in favour of the will with the whole of Clause 10, apart from the prior life interests in favour of Mrs Wightman and Miss Pedley, omitted, on the ground that, because of the omissions, the testatrix could not have known and approved of the rest of Clause 10.

Templeman J. held, first, that no gift of capital to Michael could be implied, as a matter of construction, in the will as executed. The governing principle was that words could only be implied in a will;<sup>2</sup>

"Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted."

In the instant case, however, although there was clearly some omission from the residuary gift as it appeared on the face of the will, it was not clear from the context that what was omitted was a gift of capital to the testatrix's son, Michael. Therefore, on its true construction, the will as executed contained a gift of capital, following the life interests, to Michael's wife and children, whereas the testatrix thought that it contained a gift of capital to Michael if he survived the two life tenants. Templeman J., despite reaching this conclusion, commented @ page 164:

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2. *In re Follett (deceased), Barclays Bank Ltd v Dovell* [1955] 1 W.L.R. 429 @ pp.431 and 437.

"I am tempted to construe the will in the light of the known intentions of the testatrix, thus giving effect to her wishes and avoiding any question of omitting part of the will from probate. The will must, however, be construed according to its terms."

According to the terms of the will, the judge held, secondly, that the testatrix did not know and approve of the ultimate gift of capital to Michael's wife and children. At pages 163-164 he said:

"The contemporary documents and the affidavit evidence now available show beyond any doubt that the testatrix thought and intended that the will she signed contained a gift in reversion of the capital of residue to Michael."

On the authority of *Re Horrocks*,<sup>3</sup> the jurisdiction of the court, in such a case, was confined to ordering the exclusion of words: it had no power to order the insertion in the will of the omitted words which appeared in the draft. In the present case, therefore, if the power of omission were exercised, the intended ultimate gift over to Michael's wife and children would not stand with the result that a partial intestacy would ensue. The practical effect of distribution on partial intestacy would not be in accordance with the testatrix's real intention as established by extrinsic evidence: the capital would not go to Michael entirely but be divided among the testatrix's next-of-kin. Michael would then undoubtedly benefit but not to the extent envisaged and intended by his mother.

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3. *Re Horrocks, Taylor v Kershaw* [1939] P.198, per Sir Wilfred Greene M.R. @ p.216.

Templeman J. considered these problems but concluded that, in his judgment,<sup>4</sup>

"... whatever the result, the gifts in Clause 10 of the will, other than the life interests of Mrs Wightman and Miss Pedley, must be omitted."

He ended:<sup>5</sup>

"The result is not satisfactory but will perhaps encourage a further study of the recommendations which have been made from time to time that rectification of a will should be allowed on the same terms as rectification of other instruments, with perhaps the added safeguard of written contemporaneous evidence supporting the claim to rectification. There is ample such evidence in the present case, but it does not enable the will to be rectified."

This criticism by the judge in *In re Reynette-James* has been added to by several legal commentators.

Professor E.C. Ryder echoes the criticism already made of *Re Morris*<sup>6</sup> that to strike out words approved and acknowledged by the testator but whose meaning is changed by the omission of other words is to exceed the court's powers. He comments:<sup>7</sup>

"... it is one thing to say: "These words have crept into the will by accident; the testator never intended them to be there; they must therefore be struck out"; it is quite a different thing to say: "These words were inserted intentionally; the testator knew they were there and intended them to be there; but (as the result of an omission elsewhere) they do not produce the result which the testator wanted to produce; they must therefore be struck out."

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4. [1976] 1 W.L.R. 161 @ p.168.

5. Ibid.

6. Supra p.116.

7. 40 Conveyancer 312 @ p.314.

He contends that in the latter type of case the court is, in effect, remodelling the testator's own language to produce a result more in keeping with the testator's intentions as ascertained from extrinsic evidence. Such a course, he argues, runs counter to established principles of construction and weighty decisions, such as *Collins v Elstone*.<sup>8</sup> He would not, therefore, be surprised if a higher court took a different view.

On principle, a higher court might well reset the limits of this area of mistake as they stood before the decisions of *Re Morris* and *In re Reynette-James*. For, in strict terms, these cases have combined to give some, hitherto unknown, measure of significance to testator's intentions not generally thought to be sanctioned by the common law. On the other hand, it is possible that the view will be taken that awkward manoeuvres to circumvent a much criticised aspect of the law of succession ought to be heeded. Where the law is deficient substantial repairs should be effected: not simply case to case First Aid. As Bates argues in the New Law Journal:<sup>9</sup>

"... the testator's intentions, where they can reasonably be deduced from evidence available, should be paramount; otherwise, the spirit of the Wills Act is itself subordinated to the formal requirements designed to put that purpose into effect.

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8. [1893] P.1 and *infra* p. 125.

9. G.M. Bates Another Case for Intention (1976) 126 N.L.J. 1083 @ p. 1085.

So let us hope that the equitable doctrine of rectification will soon be applied to wills and that the Wills Act itself will be subjected to much closer scrutiny in the very near future."

Thus, where a draftsman, to whom a testator has delegated the task of drafting his will, has made a clerical slip in the drafting the testator is not deemed to have adopted that slip unless he had "knowledge and approval" of it. If the will was not read by or read over to the testator then no knowledge and approval will be imputed to him. If, on the other hand, the testator has read his will (or had it read to him) then no knowledge and approval will be conclusively accorded him. Evidence is admissible to show that certain words were not in fact approved of by the testator in spite of the fact that the testator read the will or had it read to him. In either case there might still be inadvertance on the part of the testator. What amounts to sufficient evidence to prove a lack of knowledge and approval on the part of the testator despite a reading will depend on the facts in each case. As has been seen, several cases now exist where such an absence prevailed although the will was technically "read" in a loose sense. It is submitted, however, that it would be dangerous and unwise to rely heavily on these fact situations. Each case involves some different facts although they may share broad similarities: principles can, therefore, be generally stated but their particular application to any given case can only be resolved on consideration of the



peculiar evidence of that case: probably, therefore, only in litigation.

Difficult as it has proved to distill the meaning of knowledge and approval from the compound and complex mass of case law it is yet more difficult to comprehend the courts' powers once a mistake has been discovered. This subject is considered in detail in the following chapter. Suffice it to say at this point that the courts are hamstrung by artificial distinctions and rules which preclude them, often, from giving effect to testator's known intentions. It is argued from many quarters that this is a state of affairs which has prevailed far too long.

- (iv) Word(s) inserted by testator drafting his own will which he intends to use but he is mistaken about the word's legal effect.

Where a testator has deliberately chosen to use particular words but, in fact, the words chosen do not carry out his real intention, as it appears from the surrounding circumstances, that fact is irrelevant. A testator in such circumstances is deemed to have knowledge and approval of the words and they must, therefore, remain in the will.

This point was considered in *In the Estate of Beech*<sup>10</sup> where Salter J. said @ pp.53-54:

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10. [1923] P.46.

"A testator cannot give a conditional approval of the words which have been put into his intended will by himself, or by others for him. He cannot say: "I approve these words, if they shall be held to bear the meaning and have the effect which I desire, but if not I do not approve them". He must find, or employ others to find, apt words to express his meaning; and if, knowing the words intended to be used, he approves them and executes the will, then he knows and approves the contents of the will, and all the contents, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect."

Uncertainty and confusion resulting in increased litigation would abound if the law were otherwise.<sup>11</sup> And, to allow oral evidence of intention to override actual dispositions in a will would amount, in substance, to allowing wills to be made by word of mouth. Such a circumvention of the formalities of s.9 Wills Act 1837 could not be countenanced - as the English Law Reform Committee has agreed.<sup>12</sup> But here, as elsewhere indicated in the law of mistake, some remedy is required to abate the tide of cases of hardship thrown up by the present sea of rigid principles. For many would-be testators, it is difficult to comprehend why a mistake in their understanding of a word must stand while, perhaps, written evidence of their actual intentions exist. To

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11. Albery Coincidence and Construction of Wills (1963) 26 M.L.R. 353 @ p.364.

12. 19th Report Law Reform Committee (Interpretation of Wills) Cmnd. 5301 @ para.36.

introduce evidence of their intentions would not be allowing a will to be made orally; and if those written intentions satisfy the rationale of s.9 Wills Act 1837 (that is, freedom from fraud, forgery and coercion) and perhaps even the formalities of that section then it seems a needlessly harsh law which denies relief in such circumstances.

- (v) Word(s) inserted by draftsman to whom the testator has given instructions to draw up a will: the draftsman has made a deliberate choice of words giving effect to the instructions, but he is mistaken in his choice: it does not, in fact, give effect to the testator's instructions.

In this situation it is again pertinent to enquire whether the testator has adopted the relevant words as his own, or not. In other words, has he knowledge and approval of the words or not? If so, then he will be deemed to be bound by them, despite the fact that he may be unaware that there is a discrepancy between his instructions and the effect of the will. If he is proved to have no knowledge and approval of the words themselves then he is deemed not to be bound by them.

In this area of the law of mistake the presumption of due execution imputing knowledge and approval is often invoked and, in addition, there is a reduced likelihood of a testator not having knowledge and approval of the actual words once the will has been signed. This is because it is not the inclusion of the words themselves that he is objecting to but their legal effect.

He is not saying "If I had known the words were there I would have excluded them" but rather "I knew the words were there, but if I had perceived their legal effect I would have excluded them". At this stage cases such as *Re Morris* and *In re Reynette-James* might seem to give the lie to this argument. But, as discussed, those cases pertained to another area of the law and, it appears, that the present area has not taken the opportunity of extending its boundaries so far.

In *Collins v Elstone*<sup>13</sup> this type of mistake fell to be considered. The facts of the case were these: A testatrix left two wills, and a codicil to the first will. The second will, which only disposed of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that as it only related to the insurance policy the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance the testatrix duly executed the will. It was held that the testatrix must be taken to have known and approved of those words of revocation, and that they must be included in the probate of the last will.

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13. [1893] P.1.

Following *Morrell v Morrell*<sup>14</sup> the President of the Probate Division approved of the view of Lord Hannen in that case that:<sup>15</sup>

"if a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself."

The President went on to question whether it might not be possible to extend the doctrine of fraud so as to include this mistake. He concluded, however, that there was no authority for it. He, therefore, regretted that he was<sup>16</sup>

"... compelled to come to a conclusion the effect of which I am conscious will be that the real intentions of the testatrix will not be carried out."

*Collins v Elstone* raises several points of interest.

First, support for the actual decision can be found in the judgment of Latey J. in *Re Morris* @ p.79:

"... it is established, in my opinion, that there are cases where, though the testator did not in fact know and approve the effect of what he is executing, he is deemed to do so; he is bound by the draftsman's mistake. Here again it is not easy to reconcile all the decisions and dicta, but certainly the rule does not cover all cases where a draftsman had made a mistake; indeed, it applies to a limited class of case. Its basis is one of expediency, because without it confusion and uncertainty would produce worse results."

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14. (1882) 7 P.D. 68.

15. *Collins v Elstone* @ p.4.

16. *Ibid.* @ p.3.

And again, at the same page:

"The scope of the draftsman's authority is to carry into effect the testator's intentions. In some cases (where, for example, an expert in law is needed to provide the appropriate wording to give effect in law to the testator's intentions) the testator has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning, and in such a case he adopts it and knowledge and approval is imputed to him. If the draftsman in the use of the selected phraseology which he, knowing the testator's intentions, has deliberately and not per incuriam chosen, and thus himself known and approved, has made a mistake as to the effect of that phraseology, the testator, having adopted it, is bound by the mistake."

Secondly, two cases relied on in *Collins v Estone* were not followed in *Re Morris*, namely *Guardhouse v Blackburn*<sup>17</sup> and *Atter v Atkinson*.<sup>18</sup>

Thirdly, the inability of the court in *Collins v Estone* to extend the first, fourth and fifth rules<sup>19</sup> laid down by Lord Penzance in *Guardhouse v Blackburn*<sup>20</sup> to include not only fraud but also mistake has not proved an insurmountable obstacle in other decisions as the recent trend reveals.<sup>21</sup> That trend is exemplified in the unreported decision of Sachs J. in *Crerar v Crerar*<sup>22</sup> where that judge stated that it was the court's duty:

17. (1866) L.R. 1 P & D. 109.

18. (1869) L.R. 1 P & D 665.

19. Discussed @ p.103 supra.

20. (1866) L.R. 1 P & D. 109 @ p.116.

21. *Re Morris* @ pp.76-79.

22. Ibid. @ p.78.

"... to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption of law."

That type of reasoning, if applied to the sort of mistake considered by the court in *Collins v Elstone* may well, it is submitted, have yielded a different result. But, it is accepted that it would be more difficult to adopt such an argument in respect of the *Collins v Elstone* type of mistake as opposed to the *Re Morris* kind. Any such adoption would require an extended meaning to be attributed to the words "knowledge and approval" to encompass not only knowledge and approval of the existence of the words but also knowledge and approval of their effect. Thus far no suggestion in this vein has been heard and, possibly, the potential for uncertainty and confusion it might create would preclude its adoption at all.

Finally, the realisation of the court in *Collins v Elstone* that the decision would operate to defeat the testator's intention, a realisation echoed by other judges,<sup>23</sup> must presage, it is submitted, a complete review of the principles and policies of this area of the law of

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23. See, for example, Templeman J. in *In re Reynette-James* [1976] 1 W.L.R. 161 @ p.168.

succession. How far and how often a testator's expressed intentions are to be overridden in the name of expediency and established principle is a question currently under intense scrutiny.<sup>24</sup> The various proposals suggested as an attempt to ameliorate the situation revolve around two basic ideas. The first of these is to introduce the remedy of rectification into the law of succession. The second involves a relaxation of the current evidentiary rules insofar as they pertain to probate problems. Both these suggestions are discussed in the next chapter.

In *Collins v Elstone* it was clear that the testatrix actually read her will for she queried some of its terms. She, therefore, had knowledge of the actual words which constituted her will. In the later case of *Re Horrocks*<sup>25</sup> such knowledge was imputed to the testatrix by virtue of the presumption of due execution: the testatrix signed the document as her will, she was thus taken to have knowledge of its contents. The presumption was not displaced by the evidence in the case - as it might perhaps have had the case involved a clerical slip. But while *Re Horrocks* serves as a comparison to show how knowledge may be attributed to testators, that is by no means the case's sole importance. As will be seen, the Court of Appeal's statements in the decision on the limitations of the courts' powers of omission have proved

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24. See, for example, G.M. Bates Another Case for Intention 126 NLJ 1083; R.D. Mackay Discovering a Testator's Intention 127 NLJ 1089; 19th Report of the Law Reform Committee (England) Cmnd. 5301.

25. [1939] P.198.



to be of some consequence.

The facts of *Re Horrocks* were these: A testatrix employed a solicitor to draw up her will. Among the instructions for the will was one which required the draftsman to include a gift for charitable purposes to be selected by the trustees of the will. The draftsman, therefore, in the will, gave the trustees the residuary estate upon trust.

"for such charitable institution or institutions or other charitable or benevolent object or objects in Preston and district as my acting trustee or trustees may in his or their absolute discretion select."

From the evidence it was apparent that the testatrix knew nothing about the technicalities of the law. It was equally evident that the will was not read by nor read over to the testatrix before she signed it. When the mistake which placed "or" instead of "and" between the words "charitable" and "benevolent" was discovered, the trustees brought proceedings to have the probate in common form revoked and probate granted in solemn form with the omission of the word "or".

The Court of Appeal held (reversing the court below) that the testatrix was bound by the words deliberately chosen by her draftsman; that on the facts there was no evidence cogent enough to justify the alteration in the language of the will; and that as the effect of omitting the word "or" would be to depart from the intention of the testatrix by limiting the objects of the residuary gift to those that were benevolent as

charitable, there was no jurisdiction to make the alteration asked for.

Sir Wilfred Greene M.R. gave the judgment of the Court.

On the point of the testatrix being bound by the draftsman's mistake in this instance, he said:<sup>26</sup>

"The fact that a testator or the draftsman employed by him is mistaken as to the legal effect of the language which he uses is, of course, no ground for altering the will for the purpose of procuring the legal result desired."

There was no evidence effective to displace the presumption of due execution with its attendant imputation of knowledge and approval. And, even if there were, the Court held that it had no power to accede to the trustees' wishes in altering the will. Sir Wilfred Greene @ p.216:

"The jurisdiction of the Court of Probate to grant probate of a will textually different to the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator or of the draftsman employed by him as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act."

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26. Ibid. @ p.209.

To omit the word "or" between "charitable" and "benevolent" in the will would, in the opinion of the Court, have the effect of qualifying the word charitable to exclude that part of the field of charity which was not benevolent. This the testatrix had not approved when she adopted the word "charitable" in her will. The Court therefore concluded that:<sup>27</sup>

"It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible."

These observations have provided a rich source for criticism by legal commentators.<sup>28</sup> And, indeed, it is difficult to see how or why any litigation would be instigated if the best that could be hoped for is that the part of the will remaining is to have the same meaning as before. These criticisms, and others, are dealt with in more detail in the section dealing with the court of probate's powers in this regard in the following chapter.

A final case demonstrating that the rule laid down in *Collins v Elstone* and followed in *Re Horrocks* has had recent expression is the New Zealand case of *Re Walker (deceased)*.<sup>29</sup> In that case a testatrix was held to be bound by her draftsman's use of the word "issue", although it was at variance with her intentions.

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27. Ibid. @ p.218.

28. See, for example, Lee Correcting Testators Mistakes: The Probate Jurisdiction (1969) 33 *Conveyancer* 322.

29. [1973] 1 N.Z.L.R. 449.

Henry J. following *Re Horrocks* and *Re Morris* stated:<sup>30</sup>

"The law is, I think, clear that mistake as to the legal effect of the language used is no ground for either altering the will or for construing it so that a result desired by the testatrix is obtained."

Thus it seems apparent that where a testator gives instructions to a draftsman, who makes a deliberate, but erroneous, choice of words designed to give effect to those instructions, then, once the will has been executed and the presumption of knowledge and approval applied, the testator is bound by the draftsman's mistake. How far the court may go in its attempt to remedy such a mistake is severely limited by the observations in several cases, chief amongst which ranks *Re Horrocks*.

(vi) Possible extensions to the law of mistake.

In this category it is intended to discuss two types of, as yet, unlitigated mistakes which may, arguably, extend the limits of this field of law.

The first type of mistake is that made by a draftsman (to whom the testator has assigned the task of drawing up his will) who thinks that he can bring about the effect desired by the testator on his instructions by a different legal means from that specified in his instructions.

The second sort of mistake concerns the situation where a draftsman misunderstands the testator's

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30. Ibid. @ p.451.

instructions, in consequence inserts in the will words contrary to his instructions, the will being executed without the discrepancy coming to the testator's knowledge.

Taking each mistake in turn.

As regards the first, let it be supposed that a testator desires to include a provision in his will to benefit his nephews and nieces when each attains 18 years. He writes to his solicitor, informing him of his intention, stating specifically that he wants the will to stipulate that the class of children of his brother (i.e. his nephews and nieces) should remain open until his brother's (i.e. the life-tenant's) death. The solicitor acts on the instructions but regards the express stipulation about the class remaining open an unnecessary complication to the drafting of the will. He believes that the adoption of the formula giving a proportion of the capital gift to each niece or nephew "when" he/she attains 18 years" will be sufficient to effect the testator's intentions. The testator executes the will in this form.

But, such a formula, according to the rule in *Andrews v Partington*<sup>31</sup> would operate to close the class when the oldest nephew or niece attained 18 years. Any other nephew or niece then alive would qualify for a share of the capital if he/she reached 18 years. Others, however, born after the oldest's 18th birthday would be excluded.

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31. (1791) 3 Bro. C.C. 401.

Supposing further that, in the events which happen, the class closes on the 18th birthday of the testator's niece but that 6 months thereafter twins are born to the testator's brother and sister-in-law. Would the twins be able to take any action to remedy the draftsman's mistake after the death of the testator?

This type of situation is different to that discussed in section (v) above. In that section the testator is regarded as delegating to his draftsman the task of drawing up his will in the manner in which the draftsman considers will most accurately reflect the testator's wishes. In the instant case the testator is delegating the task of drafting his will to another but within limits: the testator desires his wishes effected in a particular fashion: the draftsman overrides them believing the same effect can be achieved by a simpler method: the draftsman is mistaken. Is any course open which might result in a court of probate altering the will so that it more nearly reflects the testators' intentions?

In *Re Morris* it was argued for the plaintiff executors (Lloyds Bank) that, except in the classes of case covered by section (v) above, a testator was<sup>32</sup>

"... bound only by what the draftsman writes on his instructions. If he puts in something which is contrary to the testator's instructions, he is acting outside the scope of his authority, and the testator is

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32. See *Re Morris (deceased)* [1971] P.62, @ pp.79-81 (per Latey J.).

not bound unless, of course, the discrepancy is brought to his understanding and he adopts it. To enlarge the category of cases in which, although unaware of the draftsman's mistake, knowledge and approval is imputed to the testator and he is bound by it, would be to subtract unnecessarily and wrongly from the fundamental principle that it is for a testator and no-one else to make the will."

Latey J. expressed himself much attracted to that argument<sup>33</sup> but he held certain reservations. He continued:<sup>34</sup>

"But whether the line can be drawn there so that it follows that in all other cases there is not knowledge and approval, and the court thus has power to intervene is far from plain. There are decisions and dicta either way."

The view is taken in both Mortimer's Probate Practice<sup>35</sup> and Tristram and Coote's Probate Practice<sup>36</sup> that where a draftsman, having understood a testator's instructions, uses inappropriate language in attempting to give effect to them, then the mistake must stand. That is not disputed.<sup>37</sup> However, neither work deals specifically with the hypothetical circumstances here posited. That is, where a testator has stipulated a particular method of giving effect to his instructions and his draftsman has thought fit to reject that method for another which he (mistakenly) believes will attain an identical result.

33. Ibid.

34. Ibid.

35. 2nd ed. (1927) @ p.91.

36. 25th ed. (1978) @ p.678.

37. See section (v) supra.

The question becomes: Is due execution of the will with the draftsman's formula sufficient, in the absence of other evidence, to impute knowledge and approval to the testator? As has been seen, in most cases falling within the general principle expounded in section (v) execution alone would attribute knowledge and approval to the testator. Is it any different in this case?

The adoption of the argument of the plaintiffs in *Re Morris* demands a positive response to that question, coupled with, it is to be noted, a limited meaning of the term "knowledge and approval". Before a testator could be said to know and approve of the contents of his will the plaintiffs argued that it must be properly read to or by him, that is,<sup>38</sup>

"... in such a manner that the discrepancy between the instructions and the instrument is brought before the consideration of the testator."

And so that the meaning is verified or explained to the testator.

In section (v) it was accepted that where a testator delegates the task of drawing up a will to a draftsman then the testator is bound by the draftsman's conscious choice of words despite any mistake he may make as regards their effect. The testator, on executing his will, is deemed to have knowledge and approval of

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38. *Re Morris (deceased)* P.W.E. Taylor, *arguendo*, @ p.63.



the words in issue: he intended them to be in the will: the mistake as to their effect made by his draftsman is imputed to him.

On the other hand, where, as postulated, a draftsman exceeds his instructions, it is submitted that the presumption of knowledge and approval arising from due execution ought in most cases to be more easily rebuttable. The testator, in such a case, can only be said to intend the draftsman's form of words to remain in the will if its effect accords with the preferred legal method stipulated by the testator in his instructions. Thus the presence of the words (vis <sup>a</sup> vis the testator) is conditional only, whereas in the former case it was not. On this basis, it was argued for the plaintiff in *Re Morris* that the test for knowledge and approval ought to be reconsidered.

It is clear that the type of mistake envisaged here is more fundamental than that covered by section (v): the draftsman has not only exceeded his instructions he has also made a mistake as regards the effect of the words he has chosen. In the section (v) cases it is only the latter action which has offended.

On executing a document containing a hypothetical mistake of the nature postulated in this section, the presumption of knowledge and approval ought to be rebutted on proof that the knowledge and approval was conditional only on the effect of the draftsman's words and the effect of the testator's instructions coinciding.

Proof that this was not the case and that the discrepancy was not explained to the testator ought to result in the Court of Probate having the power to strike the offending words out of the will. This type of situation is not similar to that discussed in *In the Estate of Beech*<sup>39</sup> where a testator intended to use a word but was mistaken about its true legal effect. Here the hypothetical testator intends his instructions to be carried out in the manner he stipulated. Any variation from that course can only be deemed to be approved by him if it conforms, in effect, to his instructions. The execution of a will by a testator who is not enlightened on this point ought not, and, it is submitted, cannot, change that conditional intention into an unconditional intention. Stronger evidence, such as that proposed by the plaintiffs in *Re Morris*, ought to be required.

The second type of mistake to be discussed in this section concerns the problems which arise when a draftsman misunderstands the testator's instructions, inserts words in the will contrary to the instructions, the will being executed without the discrepancy coming to the testator's knowledge.

Mention is made of this sort of situation in Mortimer's Probate Practice<sup>40</sup> and Tristram and Coote's Probate Practice.<sup>41</sup> Both works favour the opinion that,

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39. [1923] P.46.

40. 2nd ed. (1927) @ p.91.

41. 25th ed. (1978) @ p.678.

in such circumstances, a testator is bound by his draftsman's mistake. The argument for the plaintiff executors in *Re Morris*<sup>42</sup> clearly runs counter to that view.

It is submitted that, of the two, the former view is to be preferred. The testator has given his instructions: the draftsman has misunderstood them and, therefore, used words in the will which do not give effect to them. Again, the testator's intentions have been frustrated. If the testator, however, signs the will having had the discrepancy between his instructions and the draftsman's language explained to him then he must be deemed to have adopted the draftsman's language and, therefore, to be bound by it.

If, on the other hand, the testator signs without the discrepancy having been brought to his notice, he will, *prima facie*, be deemed to have knowledge and approval of the words contained in his will. Whether this presumption can, or ought, to be rebuttable on proof of the draftsman's misunderstanding of the testator's instructions is a moot point. This is not a case of a draftsman overstepping the limits set by the instructions, as with a clerical slip and in the postulated situation just discussed. In both of those cases, before the testator can be said to approve the will, his mind must be intentionally brought to bear on the words in question and their effect. Nor is this a case of a

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42. See *Re Morris (deceased)* @ p.80.

testator being bound by the erroneous language of a draftsman chosen after comprehending the instructions. In such a situation a testator is bound by the draftsman's mistake, essentially on expeditious policy grounds. It is submitted that on those same grounds, to prevent confusion and uncertainty, a testator must be held responsible for making his intentions and instructions comprehensible to and understood by his draftsman. Failure to adopt this course would, in all probability, lead to a lack of conscientiousness on the part of testators with even more disastrous results.

It is thus contended that a distinction ought to be drawn between draftsmen who, in trying to give effect to their instructions (as they understand them), make mistakes and draftsmen who, in fact acting outside their instructions, make mistakes. Knowledge and approval ought only to be imputed to a testator in the latter case on proof of the discrepancy between the testator's instructions and the draftsman's actions being specifically brought to his attention and adopted by him.

(vii) Other types of mistake.

For completeness, it is intended to discuss, very briefly, two other types of mistake which fall on the periphery of the area of mistake covered hitherto.

First, dependant relative revocation. This doctrine arises when revocation of a will or codicil by destruction, or by another will or codicil duly executed in writing, is made conditional upon the validity of a

subsequent will or codicil. Ascertaining a testator's intention in such circumstances can be fraught with difficulties, not least because, varying with the type of revocation, different rules prevail. As R.D. Mackay states:<sup>43</sup>

"... Where the revocation is by destruction, the question of the testator's intention is one of fact, *Dixon v Treasury Solicitor* [1905] P.42. In all other cases such as revocation by subsequent will or codicil it is a question of construction: *Re Hawkesley's Settlements* [1943] Ch. 384. But in either event one is obviously involved in the difficult quest of discovering the testator's intention at the time of revocation."

In the former instance, but not the latter, extrinsic evidence of the testator's intention is, therefore, admissible.<sup>44</sup> The doctrine has two distinct applications.

The first way in which it can apply to the revocation of a will by a subsequent will or codicil is as follows:<sup>45</sup>

"A subject has been disposed of in a will and the same subject is again disposed of either in a subsequent will or in a codicil. Then if there has been no express revocation of the first will and the only revocation is that which is gathered from the inconsistency of the subsequent disposition, should such subsequent disposition fail from any reason to be efficacious, there will be no revocation of the first disposition."

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43. R.D. Mackay Conditional Revocation 127 N.L.J. 19

44. *Powell v Powell* (1866) L.R. 1 P & D 209; *Newton v Newton* (1861) 12 I.Ch.R. 118 @ pp.128 & 129.

45. *In the Estate of Southerden* [1925] P.177 @ p.185.

The second application of the doctrine has been judicially explained as follows:<sup>46</sup>

"The name of this doctrine seems to me to be somewhat overloaded with unnecessary polysyllables ... . The whole matter can be quite simply expressed by the word "conditional" as Atkin L.J. explained in *Adams v Southerden*, and the question which arises is whether or not the revocatory clause is inserted conditionally, the condition being that a new will should be set up by the document in which the revocatory clause appears."

These rules are well settled, as witnessed by the dearth of cases on the subject:<sup>47</sup>

"It seems that the matter has come before the Court of Appeal on only two occasions; once more than fifty years ago in *In the Estate of Southerden* [1925] P.177, and recently in *Re Jones, deceased, Evans v Harries and Others* [1976] 1 All E.R. 493; [1976] 2 W.L.R. 457."

The second type of mistake demanding inclusion here is the situation where a testator makes a mistake as to relevant facts of a kind likely to influence him in making his will. Of itself, a mistake of this kind will not operate to invalidate the will.

In *Re Posner*<sup>48</sup> a gift in a will was made to a woman described as the testator's wife. In fact, she was not his wife as no valid marriage ceremony had ever been

46. Per Langton J. in *In b. Hope-Brown* [1942] P.136 @ pp. 138-139; and see *Ward v Van der Loeff* [1924] A.C.653-656; *Re Davies* [1928] Ch. 24; *Re Robinson* [1930] 2 Ch.332.

47. F. Graham Glover Dependent Relative Revocation 127 N.L.J. 697.

48. [1953] P.277.

performed in respect of them. The testator was unaware of this, believing the marriage was perfectly valid. It was held that the will would be upheld. The case involved one of mistaken impression only, there being no suggestion of fraud.

Karminski J., @ p.280, required two criteria to be satisfied before the gift would be defeated:

"One is a legacy given to a person in a character which the legatee does not fill. But that by itself is not enough. In order to defeat the legacy there must also be a fraudulent assumption of that character; and furthermore, the testator must have been deceived by that fraud."

Finding no allegation of procuring by fraud in the present case Karminski J. decided the issue in favour of the plaintiff.

#### 4. CONCLUSION

From the preceding discussion it can be seen that a categorisation of cases coupled with an extraction of principles is a complicated undertaking. Conflicting dicta and decisions and pressing policy factors combine to make any attempted classification of the law on this subject tentative only. Nevertheless, in endeavouring so to do it is submitted that the following principles may be elicited.

(1) Where a testator mistakenly executes a document as his will and that document was not in fact intended to constitute his will, despite the almost identical nature of its terms, then the principles applicable vary with the jurisdiction. In England the document would not be admitted to probate for a lack of animus testandi. In New Zealand, however, a matter of form will not be allowed to stand in the way if the essential elements of execution have been fulfilled. Thus if words can be omitted to give effect to the testator's original intention the court has power to omit them but it may not insert any words. In Canada the courts have followed the course adopted in New Zealand but, additionally, permitted the insertion of words in order to give effect to the testator's intention.

(2) Where a testator by a mere clerical error inserts words in his own will which he has drafted himself, then, the words will be omitted from probate for a want of knowledge and approval if their omission gives effect to the original intentions of the testator.

(3) A clerical error committed by a draftsman contrary to his instructions which involves the inclusion of words will not bind the testator unless the very words are brought to his notice and he adopts them as his own before the execution of the will. A reading over of the will to or by the testator will not conclusively presume that he knew and approved of the words in question.

Where such a clerical error takes the form of the omission of words thereby altering the sense of those remaining *Re Morris* and *Re Reynette-James* are authority for the proposition that the words remaining will not bind the testator unless they are brought to his notice and adopted by him. Again, merely reading the will raises no conclusive presumption.

In this category of mistake the Court of Probate has omitted words not only in order to give effect to the original intentions of the testator but also in an attempt to approximate to the original intentions of the testator even if the omission of words results in ambiguity.



(4) Where a testator, drafting his own will, intentionally inserts words in his will under a misapprehension as to their true legal effect then he is deemed to know and approve of the words and he is bound by them, whatever their legal effect.

(5) Where words are inserted in a will by a draftsman to whom a testator has given instructions to draw up a will and in trying to give effect to the testator's intentions the draftsman makes a mistake in his choice of language then the testator is bound by the draftsman's mistake.

Observations in a leading case, *Re Horrocks*, have further complicated this part of the law. It was there stated that the Court of Probate's jurisdiction to omit words (where it existed) only extended to exclude words if to do so would not affect the sense of words deliberately chosen by the testator or his draftsman. 49

Possible extensions to these principles can be speculated upon but the mass of contradictions to be found in the dicta and decisions on both questions of fact and law make this a difficult task. The distinctions drawn, for example, between the insertion of words by a clerical error and their omission by the same type of error seem artificial. The result, in that case, has seen the courts attempting to inject some form of rationality into the common law where the legislature has been lethargic. A further, major, problem is the inconsistent nature of the statements on the subject of the Court of Probate's remedial jurisdiction. It seems to be generally agreed that the court's power is limited to omission and does not extend to insertion. The

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49. [1939] P.198 @ p.218.

problem is: What must be left after the omission has been effected? Is it to comprise the exact wishes of the testator? or can it comprise only an approximation thereto? As the summary of principles just discussed reveals, varying views on these questions have led to fine lines being drawn between categories of mistake which are in danger of being even further refined after cases such as *Re Morris*<sup>50</sup> and *Re Reynette-James*.<sup>51</sup> Thus it seems apposite in the next chapter to give consideration to the courts' jurisdiction to remedy mistakes of the type here contemplated. A more complete picture of how mistakes can arise and what can be done about them will thereby be obtained.

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50. [1971] P.62.

51. [1976] 1 W.L.R. 161.

## CHAPTER III

## THE POWERS OF THE COURTS TO CORRECT TESTATORS' MISTAKES

## 1. INTRODUCTION

Once it has been established that a mistake of the type discussed in the previous chapter has occurred in a testamentary instrument the need arises to consider the powers of the courts as regards its possible correction. Two occasions are available for this task. The first is when probate of the instrument is sought. The second is if the interpretation of the instrument is in question before a court of construction.

Before the Court of Probate it must be shown that the will, because of the mistake, does not express the true testamentary intentions of the testator and that it was executed without his knowledge and approval. To this end the reception of extrinsic evidence is allowed. Such evidence establishes the will as that of the testator in question and, further, raises the issue of mistake.

Before the court of construction, however, no such extrinsic evidence is, as a general rule, admissible. The Wills Act 1837 requires that testamentary intentions be evidenced only in the statutory form, therefore the court of construction is constrained, once the will is established, to confine itself to the terms of the

document itself in seeking to ascertain the testator's testamentary intentions.<sup>1</sup>

Sir J.P. Wilde explained the distinction thus in *Guardhouse v Blackburn*:<sup>2</sup>

"For the question in such cases is not what intention ought to be assigned to the words of a given written paper but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the Court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts, and pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing ... . The truth is, that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect ... . On this head, then, the Court may safely adopt the language of Mr Williams on Executors:<sup>3</sup> "In a court of construction, when the factum of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

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1. See, generally, C.H. Sherrin The Wind of Change in the Law of Wills (1976) 40 Conv. (N.S.) 66.
  2. (1866) L.R. 1 P & D 109 @ pp. 114-115.
  3. (5th edn) Vol. 1 p.313.

## 2. THE POWERS OF THE COURT OF PROBATE

A mistake in a testamentary instrument may be corrected before admission to probate if it can be shown that there is a want of knowledge and approval in respect of that part of the will. The aforementioned extrinsic evidence of mistake is admissible at this juncture to prove that that part lacked the testator's approval. As Lee<sup>4</sup> points out, knowledge and approval in this context is a limited concept, stemming from the former closely-bounded jurisdiction of the ecclesiastical court. That court had no jurisdiction to interpret the meaning of a testamentary instrument: that jurisdiction was the sole preserve of the Chancery Court. Thus, in the court of probate, in order to ensure the deletion of unwanted material from the probate copy, it may not be shown that the testator did not intend to mean what he said: all that may be shown is that he did not intend to say what he said. Hardingham puts it this way:<sup>5</sup>

"It should be noted that, while the Wills Act does not stand in the way of the introduction of extrinsic evidence to show that a particular document was not fully approved of and assented to by the testator during his lifetime, the statute does prevent the courts from using extrinsic evidence in order to ascertain or formulate testamentary intentions which may have been omitted from the will by mistake."

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4. William A. Lee Correcting Testators' Mistakes: The Probate Jurisdiction (1969) 33 Conveyancer 322.

5. Hardingham, Neave & Ford The Law of Wills @ p.59.

Thus it is emphasised that the court may not make the testator's will for him. As Knight-Bruce V.C. said in *Bird v Luckie*:<sup>6</sup>

"... no man is bound to make a will in such a manner as to deserve approbation from the prudent the wise or the good. A testator is permitted to be capricious and improvident and is moreover at liberty to conceal the circumstances, and the motives, by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator if he could be heard, might be able to answer most satisfactorily."

Once the will, with its mistake(s), has been established before the Court of Probate the question arises: What are the powers of that court in remedying mistakes? Basically its powers are exclusionary: it may omit from probate words inserted in the testamentary instrument by mistake but it may not include words omitted by mistake, as that would subvert the policy of the Wills Act that a will must be in writing.<sup>7</sup> In every problem of the sort under consideration it is therefore pertinent to inquire whether the mistake actually consisted of an introduction of words into the will or of an omission of the same from the will. In *Morrell v Morrell*,<sup>8</sup> for example, a case already discussed,<sup>9</sup> the jury found that the particular mistake was the insertion of the number "40" ~~into the~~

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6. (1850) 8 Hare 301 @ p.306.

7. This principle is mentioned several times in the preceding chapter.

8. (1882) 7 P.D. 68.

9. Supra p.99.

not the failure to put in the number "400". The Court therefore struck out the "40". A decision by the jury going the other way would not have given the court any such power to strike out.

A case on the other side of the line is *Harter v Harter*.<sup>10</sup> The short facts of the case were these: A testator's oral instructions to his draftsman included a requirement that his will contain a clause giving the residue of his estate equally to his sons when they attained 21 years of age. From these instructions a draft will was drawn which disposed of the residue in these terms: "The trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same" etc.

Having been read over by the testator the will was duly executed. The executors of the testator sought probate of the will with the word "real" omitted, which, it was alleged, had been inserted by mistake. By expunging the word "real" the testator's intentions would be effected. However, evidence was given by the draftsman to the effect that he had intended to write "residue and remainder of my real and personal estate" but that, through inadvertence, he had omitted the words "and personal".

Sir J. Hannen, in dismissing the application to have the word "real" omitted from the will, said:

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10. (1873) L.R. 3 P & D.11.

"I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause."

He went on, that since the error was one of omission it was not open to the court to supply the missing words. The will had been drawn up by a draftsman, the language had been adopted by the testator and the court had no jurisdiction by means of which it could alter the will as signed.<sup>11</sup>

It may be seen that in every case, with three exceptions,<sup>12</sup> in the classification outlined in the previous chapter the will in question contained a word, or words, inserted through inadvertance. Potentially, therefore, in nearly all cases discussed the Court of Probate's power to strike out could have been exercised. In most cases it was. In those where it was not an additional principle limiting the court's jurisdiction precluded it. The relevant principle has already been alluded to several times in the foregoing analysis<sup>13</sup> but it demands further mention here.

11. It is to be noted that the learned judge decided the case alternatively in reliance upon the decision of Sir J.P. Wilde in *Guardhouse v Blackburn* (1866) L.R. 1 P & D 109.

12. The three exceptions being: *Re Whyte (deceased)* [1969] N.Z.L.R. 519; *Re Morris* [1971] P.62; and *Re Reynette-James* [1976] 1 W.L.R. 161.

13. See previous chapter.



The point-at-issue is: Is the Court of Probate's power to strike out limited by its (potential) effect on the remaining parts of the will? As several cases from the previous chapter show this question is far from settled.<sup>14</sup>

At the outset it is to be noted that if by omitting words which do not form part of the testator's true intentions the meaning and effect of the parts of the will specifically approved by him is completely altered, then the entire purpose of expunging is defeated. What remains would not reflect the testator's intentions. But, on the other hand, if an omission has the effect of giving effect to the testator's will or approximating thereto such omission is desirable.

Lord Blackburn in the Privy Council case of *Rhodes v Rhodes* gave his opinion on the question:<sup>15</sup>

"When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertance, such as that *In the Goods of Duane*,<sup>16</sup>

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14. See, particularly: *Re Phelan* [1972] Fam. 33; *In b. Sir J.E. Boehm* [1891] P.247; *Re Horrocks* [1939] P. 198; *Re Morris* [1971] P.62; *Re Reynette-James* [1976] 1 W.L.R. 161.

15. 7 App. Cas. 192 @ p.198.

16. (1862) 2 Sw & Tr. 590.

the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced, so that if the instrument was inter vivos they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will 4 + 1 Vict. c.26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter v Harter* 17 has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question for the evidence does not raise it."

In *Re Horrocks*<sup>18</sup> this extract from Lord Blackburn's judgment in *Rhodes v Rhodes* was cited. In that case, it will be recalled the draftsman inadvertently inserted the word "or" (instead of "and") between the words "charitable" and "benevolent" in the testatrix's will. In refusing to omit the word "or" the Court reasoned at pages 217-218:

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17. (1873) L.R. 3 P & D.11.

18. [1939] P.198.

"...[T]he effect of striking out the word "or" and leaving the word "benevolent" is ... to qualify the word "charitable" and to cut out from its signification so much of the field of charity as is not benevolent. In other words, the omission of the word "or" alters the effect of the word "charitable" which was approved by the testatrix and which she must be taken to have intended should have its full signification. It is as though a proviso were to be inserted to the effect that the discretion of the trustees was not to be exercised in favour of a charitable object unless it was also benevolent. The result would be that the one thing as to which the intentions and instructions of the testatrix were clear would be defeated."

The Court concluded, in a passage quoted earlier,<sup>19</sup> that so to alter a will (that is, by an omission) as to affect the sense of words deliberately chosen by the testator or his draftsman would be tantamount to making a new will. That, it considered, it was not permitted to do and, questionably, on the facts of the case it refused to omit the word "or". At first sight these observations in *Re Horrocks* seem to have created an ugly snag in the law and have been criticised accordingly.<sup>20</sup> It is submitted that these remarks in *Re Horrocks* cannot be taken literally otherwise the cases of *In the Goods of Boehm*<sup>21</sup> and *In the Goods of Schott*<sup>22</sup> could not have been decided as they were and approved in *Re Horrocks*. Of the former Sir Wilfred Greene M.R. said, in giving the judgment of the Court:<sup>23</sup>

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19. Ibid. @ p.218 and supra at p.132.

20. See, for example, Lee, op. cit., @ p.330 and Hardingham @ p.66.

21. [1891] P.247.

22. [1901] P.190.

23. *Re Horrocks* @ p.220.

"But it is one thing to strike out a word which leaves what is left devoid of ascertainable content and therefore inoperative; it is quite another thing to strike out a word when by doing so the meaning of what is left is qualified and cut down. It is clear from Sir Francis Jeune's reference to *Rhodes v Rhodes*<sup>24</sup> that he did not conceive himself to be doing something which altered the sense of what remained."

Of the latter case he opined:<sup>25</sup>

"Here again the effect of the omission was not to alter the sense of what remained."

Were a literal interpretation of the observations in *Re Horrocks* to be insisted upon then there would be little incentive to initiate proceedings for the omission of material from probate the aim of such a course being, usually, to bring about a state of affairs under which those commencing the action benefit - such a position not being effected by the will as it stands.

It is suggested, therefore, that when Lord Greene spoke of not affecting the "sense of words deliberately chosen by the testator or his draftsman" what he had in mind was the adoption of a formula which would preclude the possibility of an omission being ultimately construed to arrive at a meaning totally at variance with the testator's intention. If, however, the omission was to have the effect of altering the will while keeping within the general sense of that which the testator intended then it ought to be permitted. Without such an inter-

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24. (1882) 7 App. Cas. 192.

25. *Re Horrocks* @ p.220.

pretation Lord Greene's apparent agreement with *Boehm* and *Schott* is inexplicable.

This explanation serves to interpret the High Court of Australia decision of *Osborne v Smith*<sup>26</sup> where *Re Horrocks* was approved. In that case the Court refused to admit the will of the testatrix to probate for several reasons which indicated a lack of knowledge and approval. The problem arose because the testatrix left a legacy of £100 a year to the Home of Peace, Petersham, for as long as a business forming part of her estate should be carried on by her trustees, and £200 to the Home of Peace when the business should be sold. There was cogent evidence that the testatrix did not intend the Home to receive any annual payment. At p.162 Kitto J. explained the Court's difficulty that:

"... if the existing clause in favour of the Home of Peace were to be struck out, the gift to the appellant [the residuary beneficiary] would necessarily have an effect different both from that which it has on the face of the instrument and from that which the deceased intended it to have."

Any omission would, therefore, cause the will to bear that unacceptable class of "intermediary meaning" outside the general sense of the words "deliberately chosen by the testator or his draftsman". Following *Re Horrocks* the High Court of Australia refused to allow this.

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26. (1960) 105 C.L.R. 153; 34 A.L.J.R. 368.

Against this background of the Court of Probate's exclusionary jurisdiction of words inserted by mistake coupled with the limitations imposed by *Re Horrocks*, the cases of *Re Morris* and *Re Reynette-James* stand out. In neither case did the court exercise its power to omit words included by mistake, instead it omitted words intentionally included but which, because of the inadvertent omission of other words, had had their effect altered. As indicated elsewhere in this work,<sup>27</sup> it is thought that in so doing the courts in both cases exceeded their jurisdiction. On that premise it seems pointless to attempt to determine whether by such an ultra vires omission the courts thereafter brought themselves within the *Re Horrocks* guidelines.<sup>28</sup> Rather, it is thought, in both cases the courts by their omissions were attempting in a general way, "to get nearer to the intentions of the testator" as Templeman J. expressed it in *Re Reynette-James*.<sup>29</sup> However laudable the end, it cannot, it is submitted, justify the means used to attain it. That end may, therefore, be called into question by a higher court were a case raising similar issues to come up before it.

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27. Supra p. 120.

28. See Hardingham's three propositions at pp.67-68.

29. *Re Reynette-James* @ p.167.

The complexity of the law in this area, the artificial distinctions of mistaken insertion or omission, the problems associated with the terminology of *Re Horrocks* and the new departure in cases such as *Re Morris* and *Re Reynette-James* raise important issues. For example, are the decisions in those cases to be given a more secure foothold in succession law? Unquestionably they represent a dispensation of "justice" in a wide sense, but before now such an ideal has often had to be sacrificed to unyielding rules of law. Both cases attempt to give the testator's intentions a paramountcy not enjoyed hitherto. And can a more equitable formula not be advanced which would rid the law of distinctions surrounding the question of mistaken inclusion as opposed to mistaken exclusion? Finally, are the much-criticised and equally much-misunderstood observations of Lord Greene in *Re Horrocks* to continue to be the price to be paid for a reluctance to interfere with the Wills Act 1837? It is incumbent upon the legislature to appreciate these problems and make some attempt to remedy them instead of leaving it to the judiciary to circumvent antiquated vestiges of past eras in trying to "do equity". Changes must surely be long overdue. What form they might take is discussed in the section dealing with possible reforms.

### 3. THE POWERS OF THE COURT OF CONSTRUCTION

Once a grant of probate has been made in respect of a will questions may arise as to the interpretation of the language therein used. Any such questions are dealt with by a court of construction.

The object of a court of construction, in construing a will, is to ascertain the intention of the testator. In the words of Viscount Simon L.C.:<sup>30</sup>

"The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case - what are the "expressed intentions" of the testator."

In carrying out its task the court of construction is limited in several ways.

First, the grant of probate is conclusive as to what the words of the will are. Thus the court cannot look at the original will in order to correct any error alleged to exist in the wording of the probate copy of the will.<sup>31</sup> It can, however, inspect the original for the purpose of considering its format: for example to examine punctuation or the presence of blanks.<sup>32</sup>

30. *Perrin v Morgan* [1943] A.C. 399 @ p.406.

31. *Oppenheim v Henry* (1853) 9 Hare 802; *Gann v Gregory* (1854) 3 De G.M. & G. 777; and *Re Cliff's Trusts* [1892] 2 Ch. 229.

32. E.g. *Houston v Burns* [1918] A.C. 337; *Re Harrison* (1885) 30 Ch.D. 390; *Re Battie-Wrightson* [1920] 2 Ch.330; *Manning v Purcell* (1855) 24 L.J. Ch. 522.



Secondly, in order to ascertain the intention of a testator as expressed in his will, the court has developed a number of general principles and several specific rules for its guidance. These are compendiously described as "rules of construction" which, in many instances, suffer from an excess of technicality.

Thirdly, the court of construction is limited as to the evidence it may admit to discover the testator's intention.

It is proposed to look at the second and third of these limitations in turn.

(i) Principles/Rules of Construction

Whether the subject-matter of this section are properly to be regarded as principles or as rules is a moot point. According to Ronald Dworkin's<sup>33</sup> analysis, principles lean in favour of a decision having an element of weight which a judge has a discretion to utilise or disregard. Rules, on the other hand, apply in an "all-or-nothing" fashion. A judge has no discretion as to whether to make use of any particular rule: if it covers the situation it must be applied. Thus, to favour the term "principles of construction" acknowledges their presumptive nature and their possible displacement. To call them "rules", by way of contrast, imports an unwarranted and unwelcome rigidity into an area already fraught with difficulties. It is submitted that the former

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33. See Is Law a System of Rules? in Essays in Legal Philosophy Ed. Summers @ p.27.

expression is to be preferred to the latter as more accurately reflective of their true nature. Support for this view may be found in several cases where the established rules of construction have been weakened by a reluctance to regard them, or refer to them, as "rules" at all. Epithets such as "guides"<sup>34</sup> and "canons of construction"<sup>35</sup> have been employed instead. In *Le Cras v Perpetual Trustee Co*<sup>36</sup> Lord Wilberforce went even further and stated<sup>37</sup> that although attempts had been made to subsume cases under a number of rules and even sub-rules, he thought that such "rules" were in reality little more than ordered lists of examples.<sup>38</sup>

What, then, are these principles (or rules) of construction?

The basic principle is that, prima facie, the words and expressions used in a will must be given their ordinary meaning - "the strict, plain, common meaning of the words themselves".<sup>39</sup> This principle will not be

34. See, for example: Harman J. in *Re Levy (deceased)* [1960] 1 Ch. 346 @ p.366; Lord Denning M.R. in *Re Jebb* [1966] 1 Ch. 666 @ p.672; and Pennycuick J. in *Re Pugh's Will Trusts* [1967] 1 W.L.R. 1262, @ p. 1266.

35. See, for example, Lord Evershed M.R. in *Re Douglas' Will Trusts* [1959] 1 W.L.R. 1212 @ p.1215; Upjohn J. in *Re Neeld* [1962] 1 Ch. 643 @ p.675; and Megarry J. in *Re Figgis (deceased)* [1969] 1 Ch. 123 @ p.124.

36. [1967] 3 All E.R. 915.

37. Ibid. @ p.926.

38. Later he even referred to the cases as "guiding illustrations".

39. *Shore v Wilson* (1842) 9 Cl. & F. 355 @ p.365.

lightly departed from: thus, if the words of the will are clear, and are capable of application by reference to extrinsic circumstances, then the court will not admit evidence to demonstrate that the testator used the words in something other than their ordinary sense.<sup>40</sup> The apparent simplicity of the principle belies its inherent difficulties: often words have more than one "ordinary meaning".<sup>41</sup> In such cases resort may be had to the "arm-chair principle"<sup>42</sup> in an attempt to ascertain which meaning the testator had in mind.

As regards technical words: they are to be given their technical meaning, unless the will shows an intention to use them in another sense. An example of the application of the general rule can be found in the case of *Re Cook*.<sup>43</sup>

In that case the testatrix by her will (made on a printed will form), gave "all my personal estate whatever" to her named nephew and nieces. Her estate comprised mainly realty. It was held that the realty was not disposed of by the will but devolved, instead, as an intestacy. Harman J. said:<sup>44</sup>

40. See, for example, *Higgins v Dawson* [1902] A.C.1; *Gilmour v MacPhillamy* [1930] A.C. 713; and *Re Jones* [1971] N.Z.L.R. 796.

41. See, for example, *Perrin v Morgan* [1943] A.C. 399.

42. See p. 171 *infra*.

43. [1948] Ch. 212.

44. *Ibid.* @ p.216.

"It seems unlikely that she intended to dispose only of the personal estate in the lawyer's sense of that word ... but this is a case where a layman has chosen to use a term of art. The words "all my personal estate" are words so well-known to lawyers that it must take a very strong context to make them include real estate. Testators can make black mean white if they make the dictionary sufficiently clear, but the testatrix has not done so. It may well be that she thought "personal estate" meant "all my worldly goods". I do not know. In the absence of something to show that the phrase ought not to be so construed, I must suppose that she used the term "personal estate" in its ordinary meaning as a term of art".

In the preceding extract Harman J. mentioned the third principle which falls to be discussed, namely: the "dictionary" principle.

It has already been stated<sup>45</sup> that it is the task of the court of construction to ascertain the testator's intention. This must be done by an examination of the whole will. Ungoed-Thomas J. in *Re Macandrews Will* *Trusts*:<sup>46</sup>

"The fundamental and overriding duty binding the court is to ascertain the intention of the testator as expressed in his will as a whole."

Thus words must be read in context. If it then appears that the testator has used them in a sense other than the usual one the sense which the testator intended them to bear must take precedence. In other words, the testator has then provided his own definition of "dictionary"<sup>47</sup> which the court must acknowledge.

45. Supra p.161.

46. [1964] Ch. 704 @ p.709.

47. See, for example, *Hill v Crook* (1873) L.R. 6 H.L. 265 (meaning of the word "children").

Another principle (or rule) of construction dealing with the testamentary document simpliciter is that which permits the court to omit change or imply words.

It has already been seen<sup>48</sup> that a Court of Probate may expunge words inserted in a will by fraud or mistake. It has no power to insert words; therefore, in such cases, probate is granted with a blank space in the will: see, for example, *Re Morris*.<sup>49</sup> A court of construction, on the other hand, cannot exclude words so as to leave a blank space. Nor can it insert words in an attempt to give effect to a testator's intention. However, that court can achieve a similar result in interpreting the language of the will by ignoring words, changing them or reading in words by necessary implication if, otherwise, the words would be meaningless or very difficult to construe or if they clearly contradict the testator's intention displayed by the will as a whole. Knight Bruce L.J.:<sup>50</sup>

"... there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to

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48. Supra p.150.

49. [1971] P.62.

50. *Key v Key* (1853) 4 De G.M. & G. 73 @ pp.84-85; 43 E.R. 435 @ p.439.

particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed."

It is to be noted that a court of construction will only read words into a will under certain stringent conditions.<sup>51</sup> Before it will do so it must be clear from the will itself, "from the four corners of the document",<sup>52</sup> not only that something has been omitted but also what, in all probability, that omission was. The principle, as it was approved in *In re Follett (deceased)*<sup>53</sup> may be stated thus:

"Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context."

In *Re Reynette-James (deceased)*,<sup>54</sup> it may be recalled that Templeman J. discussed the possible application of this principle in an attempt to solve the problem posed by the typist's omission. However, having considered *In re Smith*,<sup>55</sup> *In re Follett*<sup>56</sup> and *In re Whitrick*<sup>57</sup> he concluded that:<sup>58</sup>

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51. *In re Smith* [1948] 1 Ch. 49.

52. *In re Whitrick* [1957] 1 W.L.R. 884 @ p.887.

53. [1955] 1 W.L.R. 429 @ pp. 431 and 437.

54. [1976] 1 W.L.R. 161 @ pp.165-166.

55. *Supra* n.51.

56. *Supra* n.53.

57. *Supra* n.52.

58. *In Re Reynette-James* @ p.165 quoting from *In re Follett* @ p.434.

"... the necessary assurance, both as to the nature and wording of what has been left out, as well as to the fact of there having been an error or omission ... ."

was not to be found. Therefore, he was unable "to imply a gift of capital to Michael in the present case".<sup>59</sup>

In *Re Morris*<sup>60</sup> too, Latey J. acknowledged that a court of construction<sup>61</sup>

"... might decide from a reading of the documents alone that there was not enough intrinsic evidence to fill in the blank ..."

left by his omission of the numeral 7 from the probate copy.

Finally it is pertinent to mention here a rule commonly known as "the rule of despair".<sup>62</sup> That rule states that where two clauses in a will conflict, the later clause will prevail over the former. A striking example of the operation of the rule may be found in *Re Hammond*.<sup>63</sup> In that case the will, inter alia, gave to a beneficiary "the sum of one hundred pounds (£500)". It was held that the beneficiary was entitled to £500.

The five rules (or principles) discussed hitherto provide the basic framework for the court of construction's tasks. They do not stand alone, however, but are

59. Ibid. @ p.166.

60. [1971] P.62.

61. Ibid. @ p.82.

62. *Re Potter's Will Trusts* [1944] Ch. 70 @ p.77.

63. (1938) 54 T.L.R. 903.

supplemented by other, more specific rules of which brief mention will be made.<sup>64</sup> A detailed examination of any of these rules is precluded, it is submitted, by the fact they are used by the court simply as tools to discover a testator's intention. Thus the court retains a certain flexibility as to whether any rule applies in a given case and, if so, which one. To examine them in detail, therefore, it is thought, would be superfluous to the requirements of this paper which only requires a general appreciation of their nature with a view to an analysis of present reform proposals.

Chief amongst the more specialised rules of construction is a bias against intestacy sometimes known as the Golden Rule. Lord Esher M.R. expressed it thus in *Re Harrison*:<sup>65</sup>

"When a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce - that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is the golden rule."

Coupled with that rule are several others which attempt to militate against the possibility of intestacy: for

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64. See: Parry & Clark The Law of Succession Chap.16;  
Hardingham The Law of Wills Chap. 11.  
Feeney The Canadian Law of Wills: Construction  
Parry The Law of Succession Chap. 7.

65. (1885) 30 Ch.D. 390 @ p.393.



example, falsa demonstratio non nocet, cum de corpore constat<sup>66</sup> (a misdescription will not vitiate the document if the thing is described with certainty).

Another example is the rule in *Lassence v Tierney*<sup>67</sup> stated in *Hancock v Watson* thus:<sup>68</sup>

"If you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse, or invalidity, or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin, as the case may be."

Other specific rules of construction are to be found in the class closing rules;<sup>69</sup> the Wills Act itself (for example, ss.24, 27 and 28); the ejusdem generis rule; the rule that a clear gift is not to be cut down by ambiguous words,<sup>70</sup> and the rules relating to satisfaction.<sup>71</sup>

Before outlining the modern judicial attitude to those rules of construction, it is intended to look at the limitations placed on the court of construction in respect of evidence it may admit to discover the testator's intention.

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66. See, for example, *Re Price* [1932] 2 Ch. 54; *Re Gifford* [1944] 1 Ch. 186.

67. (1849) 1 Mac & G. 531, 41 E.R. 379.

68. [1902] A.C. 14 @ p.22 (per Lord Davey).

69. Parry and Clark The Law of Succession @ pp.426-433.

70. Parry op. cit. pp.122-123; Hardingham op. cit. pp. 241-243.

71. Parry & Clark op. cit. pp.437-443.

## (ii) Admissibility of Extrinsic Evidence

It has already been indicated that the grant of probate is conclusive as to the words of the will.<sup>72</sup> That is so, but it does not prevent the admission of extrinsic evidence to prove the existence of the object or subject matter of a gift. Because<sup>73</sup>

"The admission of extrinsic circumstances to govern the construction of a written instrument is in all cases an exception to the general rule of law which excludes everything dehors the instrument."

Such evidence is closely monitored. Only so much extrinsic evidence as is necessary to determine the identity of the persons mentioned and the things bequeathed can be heard by the court of construction.<sup>74</sup>

The operation of this general rule of exclusion of extrinsic evidence is prevented, also, by what has come to be known as the "armchair principle".<sup>75</sup> That principle allows circumstantial evidence of the testator's intended meaning to be admitted as an aid in construction in cases of uncertainty. The court is thereby able to read the will from the position of the testator making it: that is, as if sitting in the testator's armchair. In the words of Lord Romer in *Perrin v Morgan*:<sup>76</sup>

72. Supra p. 161.

73. *Colpoys v Colpoys* (1822) Jac. 451 per Sir T. Plumer M.R.

74. See, for example, *Sherratt v Mountford* (1873) 8 Ch. App. 928 @ p.929 (per James L.J.); *Doe d. Hiscocks v Hiscocks* (1839) 5 M & W 363 @ p.367 (per Lord Abinger C.B.).

75. Supra p. 164.

76. [1943] A.C. 399 @ p.420.

"... My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said ... ."

The "armchair principle" most clearly applies in cases where the words of the will do not correspond with external circumstances at the time when the will is made. In such cases the usual dispute concerns the identity of either the object or the subject-matter of the gift. A good example of a misdescription of the object of a gift is to be found in the case of *Charter v Charter*.<sup>77</sup> By his will the testator, a farmer, appointed "my son Forster Charles" as his executor and gave him his residuary estate. The facts revealed that the testator had had a son called Forster Charter who had died some years before the testator drew up his will. At the date of the will the testator had two sons, namely, William Forster Charter and Charles Charter. A grant of probate was made in respect of William. Charles challenged this, and at the subsequent trial extrinsic evidence was admitted of the surrounding circumstances extant when the testator executed his will. The evidence revealed that

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77. (1874) L.R. 7 H.L. 364.

at that time Charles lived at home with his parents and worked on the testator's farm, that William had lived away from home for some years and rarely visited the testator, and that the testator never called William "Forster". The court held Charles to be successful in his challenge and revoked the grant of probate to William. William failed in an appeal to the House of Lords which was evenly divided. The House held, inter alia,<sup>78</sup> that the provision in the will under which the executor was directed to pay an annuity and allow maintenance to the testator's widow "so long as they reside together in the same house" was only appropriate when applied to persons who were living together at the date of the will. As stated, the surrounding circumstances showed that Charles, and not William, lived with his parents at the time when the executor made his will.

The principle can also be applied in cases where words in the will have more than one meaning. Circumstantial evidence is then admissible to help resolve the uncertainty of which meaning the testator intended the words to bear.

Where, however, the words in a will have a plain meaning then they must be construed accordingly: extrinsic evidence cannot be used as a basis for an inference that the testator meant something which he did

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78. It is to be noted that the House also held that declarations by the testator of his intention to benefit Charles had been improperly admitted in evidence because there was no equivocation: *infra* p.178.

not say. In *Higgins v Dawson*<sup>79</sup> a will contained a gift of the residue of the testator's mortgage debts after payment thereof of his just debts and testamentary expenses. The House of Lords held that evidence as to the state of the testator's property at the date of the will was not admissible to show that he meant to charge not only his just debts and testamentary expenses on his mortgage debts but also certain pecuniary legacies which he had given by will. Lord Shand said:<sup>80</sup>

"The case is not one in which either the property dealt with by the testator, or the legatees or persons to be benefited by the will, are at all doubtful. In the class of cases in which you cannot tell exactly what is given or to whom it is given because of obscure and doubtful expressions of the testator's will in regard to the particular conditions of his property, you must have recourse to extrinsic evidence in order to ascertain his meaning. But here, in the first place, the will is in its expressions and language, as I think, unambiguous; and that being so, no proof in reference to the amount of the testator's estate at the date of the will can affect its construction. It appears to me that the purpose, or the effect at all events, of the proposal to lead evidence in this case is to supply a basis for inferring the intention of the testator, and to take one away from the true construction of the will as showing that the testator intended something different to what he has said. I agree with his Lordship in thinking that, even if it would be shown that the intention of the testator was something different from the language of the will, that intention would not prevail, but that the language of the will must settle the rights of parties."

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79. [1902] A.C. 1; [1900-3] All E.R. Rep. 1470.

80. Ibid. @ p.1475.

Thus, it can be seen that it is the primary duty of a court of construction to construe the words of the will. As Farwell J. lucidly said in *Re Hodgson*<sup>81</sup> the court should not ascertain surrounding circumstances and in the light of that knowledge construe the will, but, rather, it should perform the reverse process. If the plain meaning of the words used is clear, surrounding circumstances cannot be looked at to throw a doubt on it.<sup>82</sup> If, however, the ordinary meaning accorded the words of the will result in their not being apt to apply to the surrounding circumstances then the court is entitled to see whether the language used is capable of some meaning other than its ordinary meaning. In this way effect can be given to the intention of the testator as shown from the language he has used having regard to the surrounding circumstances.

The reasonable clarity of these rules has not prevented some judges from applying them in a liberal fashion. *Day v Collins*<sup>83</sup> is a case in point. The facts of that case were these: The testator made a will on the 13th April 1922 containing the following provision: "I give to my wife an annuity of one hundred and fifty pounds". Two women claimed the annuity: one,

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81. *Re Hodgson* [1936] Ch. 203 @ p.206; and see Theobald Wills (13th edn 1971) par. 427.

82. See, for example *Higgins v Dawson* supra; *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] A.C. 207; and *Re Satterthwaite's W.T.* [1966] 1 W.L.R. 277.

83. [1925] N.Z.L.R. 280.

Charlotte Jane Collins, the lawful wife of the testator, whom he had married in England in 1885 and deserted about four years later; the other, Emily Sophia Collins, whom he had "married" in New Zealand in 1899 and with whom he lived until his death in 1922. The testator had made a previous will (revoked shortly afterwards by the will in question) by which he gave everything "to my wife Emily Sophia Collins absolutely". The question for the court was whether the lawful wife (Charlotte Jane) or the de facto wife (Emily Sophia) took the annuity.

It was held by the Court of Appeal that the de facto wife was the person designated by the expression "my wife". Emily Sophia Collins was, therefore, entitled to the annuity.

A strict application of the rules just discussed would, it is submitted, have resulted in Charlotte Jane Collins taking the annuity: the will gave the annuity to the testator's wife; the testator had a legal wife, prima facie, then, she ought to have taken. The ambiguity was established by facts proved outside the will as Sim J. readily acknowledged.<sup>84</sup> The Court of Appeal, therefore, permitted the admission of extrinsic evidence in order to create a doubt rather than to solve an ambiguity which the words of the will themselves had demonstrably created. The course pursued by the court is difficult to reconcile

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84. Ibid. @ p.301.

with Sir James Wigram's second proposition<sup>85</sup> and with the decision in *Higgins v Dawson*.<sup>86</sup> It is submitted, however, that it is indicative of the courts' reluctance to be bound by strict rules in this area, particularly when an unflinching obedience to the rules themselves might result in a decision manifestly at variance with the testator's intentions. This reluctance continues to prevail in present times to the extent that reforms have been advocated in some quarters to relieve the judiciary of the onerous task of trying to make malleable some essentially inflexible rules. These possible reforms are discussed in the following section.

Extrinsic evidence is, therefore, admissible in certain circumstances as an aid in construction. Noticeable by its exclusion, however, is direct evidence of the testator explaining what he intended to do by his will. The general inadmissibility of such statements is usually explained on the basis that the task of the court of construction is not to attempt to ascertain what the testator had in mind but, rather, what he had contrived to express in writing.<sup>87</sup> Two exceptions to this general rule exist.

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85. Extrinsic Evidence in the Aid of the Interpretation of Wills (5th edn 1914) @ pp.16-18; and see Appendix (infra).

86. Supra n.79.

87. See *Perrin v Morgan* [1943] A.C. 399 @ p.406 (per Simon L.C.); and R.D. Mackay Discovering a Testator's Intention (1977) 127 N.L.J. 1089.



The first concerns the case of equivocal descriptions and may be explained thus: Where a will refers to a person or thing, and prima facie, that description seems clear but, when applied to the relevant surrounding circumstances, it appears that the description fits two (or more) people (or things) with equal accuracy, then evidence of what the testator said he intended is admissible to determine which of the persons (or things) he had in mind. A good illustration is to be found in the case of *Doe d. Gord v Needs*.<sup>88</sup> There, a gift in a will was made to "George Gord". It transpired that there were two persons of that name who were potential claimants. It was held that direct evidence of the testator's intention would be let in to show which of the two he had in mind. The grounds on which this kind of evidence is rendered admissible have been judicially explained thus:<sup>89</sup>

"In each case this kind of parol evidence is not admissible for the purpose of controlling, varying, or altering the written will of the testator, but is admitted simply for the purpose of enabling the court to understand it, and to declare the intention of the testator according to the words in which that intention is expressed. If such intention establishes that the description in the will may apply to each of two or more persons, then a latent ambiguity is exposed, and rather than the devise should fail altogether for uncertainty, the law allows the ambiguity which is exposed by the parol evidence to be cleared up and removed by similar evidence, provided such parol evidence is sufficient to enable the court to ascertain the sense in

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88. (1836) 2 M & W 129.

89. *Grant v Grant* (1870) L.R. 5 C.P. 385 per Bovill C.J.

which the testator employed that particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the court cannot give effect to that part of the will."

The second exception to the general rule admits direct evidence of intention if its effect is to rebut certain equitable presumptions.<sup>90</sup> It is of note that if extrinsic evidence is admitted to rebut an equitable presumption, contrary evidence supporting the presumption is also admissible.<sup>91</sup> But, if no equitable presumption is applicable, the general rule applies and extrinsic evidence of the testator's declarations of intention is inadmissible.<sup>92</sup>

The general rule excluding direct evidence of a testator's intention exists to prevent the formal requirements of the Wills Act from being subverted if evidence could be admitted to overcome the clear words of the will. By executing a will a testator is expected to have "channelled"<sup>93</sup> his thoughts with due regard to the seriousness of the undertaking. If it appears the he has failed to express himself in clear and unambiguous terms while engaged in a task of such importance then, it is

90. Usually the presumptions of satisfaction; see Parry & Clark op. cit. pp.437-443.

91. *Kirk v Eddowes* (1844) 3 Hare 509 @ p.517.

92. *Re Shields* [1912] 1 Ch. 591; *Hurst v Beach* (1821) 5 Madd 351 @ p.360; and *Hall v Hill* (1841) 1 Dr & War 94 @ pp.124-128.

93. See the rationale of the formalities in Chapter 1.

argued,<sup>94</sup> it is not for the court to attribute to the testator an intention which cannot fairly be deduced from such wording. The point is taken by others,<sup>95</sup> however, that nor is it for the judiciary to arrive at decisions which clearly defeat the testator's intentions. This disparity of opinion can be clearly found in the reported cases and it is submitted that whereas the former view was largely preferred last century and earlier this century the prevalent judicial attitude favours the latter. That there still is a dual approach to the question of construction can be clearly seen from the case of *Re Rowland*.<sup>96</sup> In that case the majority took the strict literal approach: Lord Denning opted for the more liberal stance.

The material facts of *Re Rowland* were these: Dr Rowland and his wife executed similar wills shortly before they went to the South Pacific where the doctor was to be employed. Both wills left the whole estate to the survivor with the following provision appearing in the husband's: "In the event of the decease of the said "wife" preceding or coinciding with my own decease" then the property was to be distributed amongst his chosen blood relatives. A similar provision appeared in the wife's will, the only difference being in the choice of her own blood relatives.

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94. R.D. Mackay op. cit. @ p.1089.

95. See, for example, Lord Atkin in *Perrin v Morgan* [1943] A.C. 399 @ p.415.

96. [1962] 2 All E.R. 837.

Once in the South Pacific, the couple were presumed drowned when the ship in which they were travelling disappeared without trace. There was no evidence as to the actual order of their deaths. This, however, was determined by s.184 of the Law of Property Act 1925<sup>97</sup> by which the younger wife was deemed to have survived her older husband. The practical result, then, was that all of Dr Rowland's property fell into his wife's estate for eventual distribution amongst her blood relatives.

In arriving at this conclusion the majority of the Court of Appeal considered that there was nothing in the body of the will to suggest that the word "coincide" bore other than its natural and ordinary meaning which was "simultaneous". Nothing in the document itself indicated that the word should be given a wider meaning and, in the Court's opinion, it would be wrong to attribute to the testator an intention which could not be discovered from a simple reading of the will. The strict view of the majority is exemplified in this passage from Russell L.J.'s judgment:<sup>98</sup>

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97. s.184 states: "In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

98. *Re Rowland* @ p. 845.

"It is an unsound approach to the construction of the will to ask oneself what the testator, if he had thought of an event not covered by the natural and normal meaning of his language, would have wished had he directed his mind to the event. The question is what event does his language cover? To ask more is to desert the source from which his intention is to be gathered, his will as proved."

Lord Denning's dissenting judgment clearly adopted a much more liberal course:<sup>99</sup>

"It is not what the testator meant, but what is the meaning of his words." That may have been the nineteenth century view; but I believe it to be wrong ... the whole object of construing a will is to find out the testator's intentions, so as to see that his property is disposed of in the way he wished. True it is that you must discover his intention from the words he used: but you must put upon his words the meaning which they bore to him. If his words are capable of more than one meaning, or of a wide meaning and a narrow meaning as they often are, then you must put upon them the meaning which he intended them to convey and not the meaning which a philologist would put upon them ... . What you should do is to place yourself as far as possible in his position, taking note of the facts and circumstances known to him at the time, and then say what he meant by his words. All this follows, I think, from the case in the House of Lords of *Perrin v Morgan*.<sup>1</sup>

In *Perrin v Morgan* the House of Lords firmly rejected any fixed or "cast-iron"<sup>2</sup> meaning of the word "money". Their Lordships then took the opportunity afforded by that case to give their opinions on the rules of construction. They stated that the cardinal rule of

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99. *Re Rowland* @ pp. 840-841.

1. [1943] A.C. 399.

2. Per Viscount Simon L.C. @ p.406.

construction is that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. Lord Romer stated:<sup>3</sup>

"In many of the cases to be found in the books the court is reported to have said that the construction it has put on a will has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred, [i.e. that the testator did not mean what he has plainly said] no sort of objection can be taken to it, but if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will, read in the light of the circumstances in which it was made, convinces it was the real intention of the testator, it has misconstrued the will. My Lords, I do not, of course, intend to suggest that well settled rules of construction are to be disregarded. On the contrary, I think that they should be strictly observed, but they ought to be applied in a reasonable way. It is, no doubt, of great importance to lawyers and others engaged in the preparation of wills that they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has for generations past attributed to them. Much confusion and uncertainty would be caused if this were not so. The rules of construction, in other words, should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the circumstances, whether or not the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning - whether

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3. *Perrin v Morgan* @ pp.420-421.

or not, in other words, to use another familiar expression, the testator has been his own dictionary. I have thought it desirable to make these remarks, however elementary and obvious they may seem to be, as I have noticed in some of the reported cases on wills a tendency on the part of the court to pay more attention to the rules of construction than to the language of the testator."

*Perrin v Morgan* served to stem a tide of increasing strictness in the application of the rules of construction.<sup>4</sup> Since that case, as indicated earlier, a more liberal judicial attitude has prevailed.<sup>5</sup> That attitude has gathered much support in the twenty years from the decision in *Re Rowland* to the present day.

In the same year as *Re Rowland*, Buckley J. in *Re James Will Trusts* stated that:<sup>6</sup>

"This problem in one form or another has over the years begotten a large brood of judicial decisions, and it is tempting first to study those decisions in an attempt to distil a rule or series of rules of construction and then to proceed to apply such rule or rules to the present case. I think however that the better course to follow is first to consider the circumstances of the particular

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4. See, for example, *Higgins v Dawson* [1901] A.C. 1.

5. See, for example, *Re Manners (deceased)* [1955] 1 W.L.R. 1096 (per Upjohn J @ p.1102); and *Re Levy (deceased)* [1960] 1 Ch.346 where Lord Evershed M.R. commented: (@ p.358) "If then, I have correctly construed the testator's will and discovered his intention, is there any good reason why effect should not be given to it? ... I think there is not. I have said more than once that I do not accept the view that there is any rule of law which in such cases override intention ...."

6. [1962] Ch. 226 @ p.233.

case, and to try to discover the testator's intention without reference to authority, and thereafter to see whether a study of the reported decisions suggests any reasons for modifying whatever conclusion one may have reached."

This statement clearly inclines towards the appellation of principles, rather than rules, of construction. It advocates a pragmatic approach to the construction of wills with an eagerness to give effect to a testator's intention. A realisation that decisions failing to do the latter were becoming more prevalent, has, it is submitted, led the judiciary to do their utmost within the confines of the prevailing broad principles of construction to prevent the frequent occurrence of such events. Support for this view can be found in more recent cases.

In *Re Jebb*,<sup>7</sup> for example, (a unanimous decision) Lord Denning predictably reinforced the views he articulated in *Re Rowland* in these words:<sup>8</sup>

"In construing this will, we have to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at that time. Then we have to ask ourselves: "What did he intend?" We ought not to answer this question by reference to any technical rules of law. Those technical rules too often led the courts astray in the construction of wills. Eschewing technical rules we look simply to see what the testator intended."

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7. [1966] 1 Ch. 666.

8. Ibid. @ p.672.



In *Re Allsop (deceased)*<sup>9</sup> that same judge stated even more boldly:<sup>10</sup>

"Eschewing technical rules and literal interpretation you must look to see simply what the testator intended. If you find that a literal interpretation gives rise to a capricious result which you are satisfied the testator can never have intended then you should reject that interpretation and seek for a sensible interpretation which does accord with his intention."

The Wigram Propositions<sup>11</sup> are thus put under intense fire, as are cases such as *Higgins v Dawson*<sup>12</sup> which tended to follow the more literal interpretative process. Whether either the Propositions themselves or the case law of which they formed the basis have survived this latest judicial onslaught is much to be doubted. For the charge did not stop there. Harman L.J. remarked as follows in *Re Henderson's Trusts*.<sup>13</sup>

"Our predecessors at the Chancery Bar were much preoccupied with the construction of wills and in exploring that difficult country they were apt to leave signposts at the corners of the tortious lanes with which it abounds. These signposts they called rules of construction and their perfect resting-place is in M.R. Hawkins' classical volume entitled A Concise Treatise on the Construction of Wills ...

9. [1962] Ch. 226 @ p.233.
10. Ibid. @ p.47.
11. See Appendix (infra).
12. [1902] A.C.1.
13. [1969] 1 W.L.R. 651 @ p.654. Although that case turned on the exclusion of the rule in *Andrews v Partington* (1791) 3 Bro. C.C. 401 it is submitted that Harman L.J.'s words are equally applicable to the construction of wills, and, therefore, pertinent in this context.

[B]ut our generation ... has been less acquainted with them, partly I suppose because the incidence of estate duty has discouraged in testators the ambition to govern from the grave the fortunes of generations yet unborn, and partly because in the changing temper of opinion judges have been putting the search for a nicer justice above the certainty which observance of the rules supplies."

This "search for a nicer justice" has led judges such as Latey J. and Templeman J. to take the probate jurisdiction on to unchartered waters.<sup>14</sup> It can be observed that a similar venture is being undertaken by the courts of construction in exploring the limits of that jurisdiction.

In the past decade other judicial statements have served to erode even further the strict application of rules of construction in favour of the more liberal interpretation of principles of construction. As Megarry J. remarked in *Re Lawrence's Will Trusts*:<sup>15</sup>

"... in the old phrase, every will stands on its own bottom."

And Lord Denning took the opportunity afforded by the case of *Re Cohn*,<sup>16</sup> which concerned the vesting of a gift made by will, to say:<sup>17</sup>

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14. Supra p. 120.

15. [1971] 3 All E.R. 433 @ p.448.

16. [1974] 3 All E.R. 928.

17. Ibid. @ p.930.

"What then is the court to do when an event occurs which the testator never had in mind and for which he never provided? Is it then to go by the literal meaning of the words? I think not. The judge should put himself in the testator's chair and seek to discover the testator's intention - on broad general lines - without too much reliance on the letter."

In the recent House of Lords' decision of *Blathwayt v Lord Cawley*<sup>18</sup> advocates of both approaches to construction were in evidence. The case concerned the proper construction of a forfeiture clause appearing in a testator's will. The clause in question declared that:

"if any person who under the trusts hereof shall become entitled as tenant for life or tenant in tail male by purchase to the possession of [the settled property] shall (a) Be or become a Roman Catholic or (b) Disuse the surname and Arms of Blathwayt then and in either of such cases the estate hereby limited to him shall cease and determine and be utterly void and [the settled property] shall thereupon go to the person next entitled under the trusts hereinbefore declared in the same manner as if the person whose estate shall so cease shall determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead, without issue inheritable under the estate tail."

The only question of construction concerned whether the testator had intended by the clause to distinguish between sons born before and after the date of forfeiture. A strict approach led to such a result, a result which was found in both the High Court and the Court of Appeal.

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18. [1975] 3 All E.R. 625.

In the House of Lords, Lord Wilberforce and Lord Fraser approved the conclusion reached by the two lower courts. However Lord Cross, supported by Lords Simon and Edmund-Davies, took the view that it could not possibly have been the testator's intention to make such a distinction. At page 641 he said:

"If the testator has said something clearly and unambiguously, one must give effect to it even though one may strongly suspect that he did not mean to say it. But the improbability of the testator having meant to draw a distinction between sons born before and sons born after a forfeiture of his life interest by their parent is at least a ground for looking at the language used very carefully to make sure that it does clearly and unambiguously say what it is said to say."

This brief journey through some of the more recent cases concerning construction depicts the law in a state of flux. The general starting-point, the rules (or principles) of construction, are agreed upon: their application, however, is much in dispute. From the reluctant decisions of judges feeling bound to apply rules despite their being at variance with the testator's intention to the more modern cases of judges doing their utmost to give effect to the testator's intention, sometimes even transgressing the limits of the rules,<sup>19</sup> attitudes to the rules have undergone great changes. Now, it is submitted, it is fair to say that giving effect to

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19. See, for example, *Day v Collins* [1925] N.Z.L.R. 280.

the testator's intention as far as possible within the rules is of prime importance: not, it is to be noticed, applying the rules irrespective of the testator's intention. The difference between these apparently similar approaches has led to a greater willingness on the part of judges to scrutinise testamentary documents together with admissible evidence and to stress the principle aspect of the so-called "rules" of construction when reaching their conclusions.<sup>20</sup> This approach is laudable. If a will is to serve as a means for the expression of a testator's intentions to take effect after his death, then, it is submitted, it ought, as far as possible, to be construed to do just that. The present judicial attitude acknowledges this and has made a supreme effort so to apply the rules and deal with the evidence as to give the ascertained intention of the testator every chance of prevailing.

A drawback, nevertheless, still exists: namely, the limits of the rules themselves. While the judiciary have changed in their attitude towards the rules and their application of them to give greater precedence to the testator's intention, they have succeeded in doing so within the confines of the rules themselves. They have swung away from a strict interpretative stance towards a more liberal one whilst still accepting the rules.

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20. See Dworkin op. cit. @ n.33.

It is submitted that short of changing the rules judges have done as much as they can to effect testators' intentions. Given that the present attitude cannot always construe a will as the testator intended<sup>21</sup> the judiciary in such cases feel constrained to conclude against their inclinations, and the "search for a nicer justice" cannot be rewarded. The time has arrived when legislative action to alter the rules themselves ought to be considered.

#### 4. THE CASE FOR REFORM

In this chapter it has been seen that in the jurisdictions of both Courts of Probate and courts of construction inadequacies in the law are apparent. In the probate jurisdiction the powers of that court only to omit matter inserted by mistake and only then as long as the sense of that which remains is left unaltered has produced artificial distinctions in innovative case law. As regards the rules of construction, their application has been meted out with varying degrees of harshness until the present position of latitude was attained. In both courts a willingness to give effect to the testator's intention can be ascertained. And in both the impression is gained that the ultimate ability of the courts to do so within the extant rules has been reached. The question therefore is: Wherefore now? As yet, no answer has been

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21. Especially because of the limits on the introduction of direct evidence of intention.

given in legislative terms, however, proposals in England and Queensland offer some indication of the direction of the prospective "new departure".

In the 19th Report of the English Law Reform Committee submitted in May 1973 two main areas of the law of wills were considered: namely, rectification and interpretation. Although the Committee agreed<sup>22</sup> that both aspects:

"... merge indistinguishably into the fundamental problem of the proper extent of the court's power to decide on the effect of a will, as a matter of procedure they must to some extent be separated."

Which, then, was to come first? The conclusion reached<sup>23</sup> was that a court should have the power to add words first and then to ascertain what the words actually mean. This seems a logical approach since, if the court is satisfied that words have been omitted from the will, that is a fundamental defect which should be corrected, if possible, before any real attempt is made to construe the actual wording used.

It is intended to discuss rectification, for its great potential in the Courts of Probate, first and then the Committee's recommendations as regards interpretation, the latter being of singular significance in courts of construction.

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22. At para. 15.

23. At para. 16.

(i) Rectification.

At paragraph 10 of its Report the Committee state:

"It is not easy to perceive why the equitable doctrine of rectification does not apply to wills."

The difficulty acknowledged,<sup>24</sup> however, was: in exactly what circumstances ought rectification to be permitted? The Committee identified five different cases where a will might fail to give accurate effect to a testator's intention.<sup>25</sup> They were: clerical error; misunderstanding of the testator's instructions; failure by the testator to appreciate the effects of the words used; uncertainty, and lacuna.

Of the first two situations the Committee recommended that it ought to be open to the court to rectify a will where it could be established first, that the will failed to embody the testator's instructions and, secondly, what those instructions were. As regards standard of proof, the test laid down in the Court of Appeal in *Joscelyne v Nissen*<sup>26</sup> of "convincing proof" would have to be satisfied.

Of the third situation the Committee did not recommend that the remedy of rectification ought to be available. It took the view that such instances were more a matter of construction than rectification and concluded

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24. At para. 17.

25. At paras 12-25.

26. [1970] 2 Q.B. 86 @ p.98.



that:<sup>27</sup>

"... we do not consider that rectification is an appropriate remedy where it cannot be shown that the words of the will are not those which the testator meant to use or intended to be used on his behalf. To go beyond that is to pass into the wider realm of the testator's purpose."

The final two cases, of uncertainty and lacuna, were clearly excluded from any proposed remedy of rectification because both, if they were to be remedied, effectively involved making the testator's will for him.

The Committee's opinion was that these recommendations would allow the doctrine of rectification to be applied to wills on the same footing as it applied to other instruments. Thus the exclusion of the third situation was justified:<sup>28</sup>

"... there can be no rectification of a contract if it correctly embodies the words agreed upon by the parties even if there was some misapprehension as to the meaning or effect of those words."

Likewise, explaining the exclusion of the fourth and fifth situations from their recommendations, there could be no rectification:<sup>29</sup>

"... where the true intention was unascertainable or non-existent."

The Committee further recommended that any relevant evidence, including evidence relating to the testator's instructions to his solicitor for the preparation of his

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27. At para 23.

28. At para 25.

29. Ibid.

will, should be admissible and that reading the will over to the testator was one of the factors to which the court would have to pay attention, but that it should have no conclusive effect.<sup>30</sup> Finally, it was recommended that no action for rectification should be brought after 6 months from the date on which representation was first granted, except with the leave of the court.<sup>31</sup>

These recommendations are much to be welcomed, although they seem to have been greeted with something less than enthusiasm by the legislature in England.<sup>32</sup> Rectification is a remedy which would provide the Court of Probate with a much more effective method of dealing with clerical errors and misunderstandings of the testator's instructions than exist at present. Were such recommendations to be adopted it is to be hoped that the complicated common law in this area, discussed in the foregoing chapter, could be much more simply and satisfactorily dealt with than has been the case to date. Any changes in this area must balance the rationale for the existence of the Wills Act formalities against the desire to give effect to the testator's real intention. To allow a testator's oral intention to override completely the terms of his will would subvert the Wills Act. On the other hand, to fail to effect his intention by correcting

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30. At paras 30-31; and see *supra* pp. 98-122.

31. At para 32.

32. To date they have not been acted upon.

a mistake seems to be giving the fear of subversion an exaggerated significance. A balance between these extremes can, and must, be found. To allow rectification on limited grounds, it is submitted, is an equitable solution: it ensures that the Wills Act formalities still have relevance but it allows a latitude in remedy once the grounds for rectification (specified in the Report) have been proved. Thus the law of mistake appears to be ridding itself of the clogging distinctions and difficulties by which it has been bound for so long.

Whilst the reasons for the exclusion of the third situation (failure to appreciate the effects of the words used) from the ambit of the proposed remedy of rectification is appreciated, it is submitted that that is an area where rectification could potentially be a much used remedy. It is also, however, a situation which falls very much in the middle of the balance: it could be construed as rendering the Wills Act meaningless in the cause of giving effect to the testator's intention. The law does not seem ready to take that step although, it is submitted, that that ought to be the eventual outcome of reforms in this field.

The exclusion of uncertainty and lacunae are predictable. The general reception of evidence and the Committee's view of reading a will over to the testator are welcome, the latter according with the common law as indicated in the previous chapter. The time limit is unobjectionable as the need for certainty is of prime

importance in such cases, both from the beneficiaries' and the personal representatives' points of view.

These recommendations are needed to relieve the Courts of Probate from a mass of fine distinctions, tortuous reasoning and limited powers. Giving effect to the testator's intention is an aspiration of increasing importance. The use of the remedy of rectification will go some way to attaining this objective. It is therefore to be hoped that our legislature will see fit to adopt these proposals and give legislative support to judges like Latey J. and Templeman J. who have found it necessary to take the initiative in overcoming the inadequacies of the present law themselves.

Before leaving the subject of rectification it is pertinent to mention the Queensland<sup>33</sup> proposals in this regard. In its 1978 Report the Queensland Law Reform Commission recommended the introduction of the following draft provisions into Queensland succession law:

"31. Power of Court to rectify wills. (1) As from the commencement of this Act the Court shall have the same jurisdiction to insert in the probate copy of a will material which was incidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

(2) Unless the Court otherwise directs no application shall be heard by the Court to have inserted in or omitted from the probate copy of a will material which was accident-

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33. Queensland Law Reform Commission Report No. 22 (1978).

ally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within six months after the date of the grant in Queensland."

This provision does not purport to go nearly as far as the English proposals. A certain apprehensiveness can be ascertained on the part of the Queensland Commission as regards the Report of their English counterparts. Commenting that, although in favour of the English recommendations "we are hesitant to embark on what would be completely uncharted waters",<sup>34</sup> the Queenslanders tip their balance much more on the side of ensuring no subversion of the Wills Act formalities than on the side of giving effect to the testator's intention. The existence of their draft provision 31, however, indicates their acceptance that there is a serious problem to be overcome in this area, witnessed by their statement that "[t]he need for reform is well illustrated by the recent case of *Re Morris*".<sup>35</sup> The Commission describe the Court of Probate's powers of omission as an unjustifiable anomaly, and continue<sup>36</sup>

"It is, therefore, proposed to remove this anomaly by enabling the court to exercise the same jurisdiction with respect to the insertion of material accidentally or inadvertently omitted from a will as it has at present to omit material which has been accidentally or inadvertently inserted in a will."

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34. Ibid. @ p.19.

35. Ibid.

36. Ibid. @ p.20.

The Commission apprehends that a prospective litigant utilising draft provision 31 would have to show not only that material had been accidentally or inadvertently omitted from the will, but also what that material was. It is thought unlikely that the court would entertain general evidence of the testator's supposed intention; and that, in practice, the kind of evidence which would be necessary to make good a claim would be of such matters as the form of the testator's instructions to his solicitors, failures to relay instructions accurately, and errors made by clerks or typists. A limitation period is provided in the interests of certainty for all parties.

The Queensland provision is a step in the right direction but it does not go far enough. Rectification in the other areas of mistake covered by the foregoing chapter and by the English provisions would not, it is submitted, challenge the authority or supremacy of the Wills Act to the degree envisaged, and feared, by the Queensland Commission. Rather, it is submitted, the Queensland provision reflects too much the strict view of past eras which eventually contributed almost entirely to the present problems. The solution, it is submitted, is to be found in allowing the Wills Act formalities to exist whilst, at the same time, permitting as much latitude as possible to be accorded the testator's intention. By that means the formalities will be prevented from operating to thwart the testator's intentions (as has

happened in some cases) and can be seen to be receptive to the attitudes of the changing times. In this light, it is contended that the Queensland proposals will be found wanting and that the English recommendations ought to be adopted.

(ii) Interpretation.

The question of interpretation caused the Committee more difficulty:<sup>37</sup>

"It is easy enough to observe, at least in theory, the defects of the present law. Apart from being unclear, it is open to charges of inconsistency and anomaly. It is, however, we think, virtually impossible to produce rules of law which will result in every case in the real, as distinct from the expressed, wishes of the testator being carried out."

The Committee based its recommendations on the understanding that two propositions were agreed upon:<sup>38</sup> namely, first, that the requirement of the law that a will must be in writing ought to be maintained, subject to the existing exceptions. Secondly, that as far as is consistent with the maintenance of the requirement of writing, the function of the court in interpreting a will is to search for the true meaning which the testator intended his words to bear.

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37. Law Reform Committee Report para 34.

38. At para 35.

The Committee were unanimous in agreeing that the present law as set out in the Wigram Rules<sup>39</sup> was inadequate and that<sup>40</sup>

"...the time has come to abolish the Wigram Rules and replace them by a more comprehensive formula."

The Committee recommended that extrinsic evidence ought to be generally admitted, and in two circumstances in particular. First, to establish the special meaning or significance which the testator was accustomed to attach to any word, name or expression used in the will.<sup>41</sup>

They regarded this proposal as being an extension of the "dictionary principle",<sup>42</sup> and commented:<sup>43</sup>

"The ultimate purpose of construing a will is acknowledged to be to give effect to the wishes of the testator. Having first rectified the will so as to ensure that the language is that which the testator intended to use, there seems no reason not to take the further step of discovering, by all means available, what those words conveyed to him."

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39. See Appendix. It can be seen from the discussion at p.177 that these Rules have not been adhered to strictly.

40. At para 46.

41. At paras 41-43.

42. At para 43.

43. At para 41.



Secondly, the Committee recommended that extrinsic evidence be admissible to establish as well as resolve any equivocation in a will, notwithstanding that the ambiguity is not apparent in the fact of the will.<sup>44</sup> Thus a decision like *Higgins v Dawson*<sup>45</sup> could be avoided, and one like *Day v Collins*<sup>46</sup> justified.

Both of these recommendations are to be welcomed. In both areas, despite straining by the judiciary,<sup>47</sup> testators' intentions can often not be carried out. By proposing such changes to the present law it is to be hoped that the courts of construction will be able to effect testators' intentions with considerably more ease, yet, at the same time, without detracting from the requirements of the Wills Act.

Over the question of whether this general admission of extrinsic evidence ought to encompass direct evidence of the testators' dispositive intent the Committee disagreed. A majority of eight considered that such evidence should be admissible, as at present, only to resolve an equivocation.<sup>48</sup> A minority of five considered that there was:<sup>49</sup>

44. At paras 44-45.

45. [1902] A.C.1.

46. [1925] N.Z.L.R. 280.

47. For example in *Higgins v Dawson* supra n.45.

48. Supra p.178.

49. At para 55.

"...no justification, either in theory or in practice, for making a special exception for direct evidence of the testator's dispositive intention."

The minority would, therefore, admit all extrinsic evidence in every case.

The reasons for the majority view<sup>50</sup> were that to allow such evidence would go beyond that admissible for other written instruments; that many unmeritorious claimants would "have a go" at wills, thereby eroding the confidence of testators and their advisers and possibly delaying the administration of estates; and that it would be difficult for the court to weigh direct evidence of the testator's intention, since the question would involve the testator's veracity, clarity of purpose and consistency quite as much as the reliability of the witnesses.

As to the first, whilst its truth is conceded it may be that the peculiar nature of wills calls for unique rules to be made in respect of them. The other two criticisms, it is submitted, could quite adequately be dealt with by experienced courts which might well prefer that type of problem (should it arise) to those arising from the present rules of construction. In any event as the minority pointed out<sup>51</sup> information received from other jurisdictions demonstrates that full admissibility works well and that there is little likelihood of

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50. At para 54.

51. At para 59.

a judge not being able to deal with such problems adequately:<sup>52</sup>

"To abolish all exclusionary rules of evidence in this field would accord with the general trend of modern judicial policy and with the full force and logic of the arguments of the majority. Wills have long been construed by judges and not juries so the distinction between the admissibility of evidence and the weight to be attached to it are in small danger of being overlooked or misunderstood. The law could be reformulated with extreme simplicity ... without difficult and anomalous exceptions and with the maximum likelihood of doing justice in disputed cases."

The minority favoured the introduction of a principle similar to that embodied in section 90 of the Republic of Ireland's Succession Act 1965 which provides that<sup>53</sup>

"Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."

They were careful to point that, however, that such direct evidence should not be set up against the plain words of the will itself. In other words, the balance between the Wills Act and the testator's intention ought to be maintained: the latter not being allowed to overcome the former rendering it of no effect. As in the case of rectification, for such evidence to be admitted there must be some ground recognised by law which must be satisfied first: namely, a legitimate dispute about the language

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52. Ibid.

53. At para 55.

of the will. Any other view would jeopardise the position of the Wills Act requirements, requirements which (although in need of some repair<sup>54</sup>) do accomplish a difficult task well.

It is submitted that the minority view is the preferable one. If the courts are to be charged with the task of ascertaining what the testator intended to be the effect of the words used in his will, then they ought to be entitled to look at any material which has probative value and decide on what weight to attach to it. Evidence of the testator's dispositive intent must be the single most important piece of evidence constituting the "surrounding circumstances" of a will. It seems anomalous, therefore, that it should be the very item that is excluded. The courts have had a sufficient history of dealing with construction cases to be able to sift and weigh evidence on the scales of a nicer justice with good effect. Such a proposal does not seek to undermine the Wills Act (only being admissible in cases of legitimate dispute about the language of the will): it merely seeks to redress the balance of testators' intentions vis-à-vis the Wills Act formalities to an even keel. To deny that reveals an unwarranted reluctance to place legislative faith in the judiciary. To facilitate the introduction of the proposal would be to bring some

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54. See, generally, Chapter 1.

semblance of order to a field in much disarray. Justice could then be achieved according to principles, not despite them.

## 5. CONCLUSION

Of the proposals for reform discussed, it is submitted that the English ones are the more commendable. The introduction of the remedy of rectification into our law would be a welcome panacea for at least some of the ills contemplated in the previous chapter. Worthwhile thought may, however, be given to extending a wider scope to the remedy were it to be introduced into New Zealand probate law. It is submitted, for example, that although the English Committee rejected extending the remedy to the situation where a testator fails to appreciate the effects of the words used, in many such cases rectification could be the best method of effecting the testators' intentions. As the previous chapter revealed,<sup>55</sup> the relevant common law is clearly in an unsatisfactory state.

To introduce rectification as a possible remedy, however, excites opposition from adherents of the argument that the Wills Act will thereby be rendered meaningless. This need not be so. If a more liberal stance were taken in respect of the relaxation of formalities (as advocated

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55. Supra pp. 122-124.

in Chapter 1) coupled with a greater effort to effect testators' intentions (whilst not detracting from the rationale of the formalities), then, a closely monitored use of the remedy would be beneficial and far-reaching rather than dangerous and unwise.

As regards the English proposals for the admission of extrinsic evidence general admission, particularly in the cases of special meanings of words and equivocations, is laudable and necessary to relieve the present pressure caused by difficult, variously-applied rules of construction. Whether direct evidence of testators' dispositive intent ought also to be admitted produced a division within the Committee.<sup>56</sup> It is submitted that the minority view favouring admission is to be preferred.

It was contended in Chapter 1 that formalities ought to be reduced to a minimum consistent with their rationale being satisfied. One reason for that view was that, thereby, more testators' intentions would not be frustrated on account of a mere technical defect. The position of importance accorded testators' intentions in that part of the law should not be eroded in this. Consistency, and the search for "a nicer justice" demands the general admission of testators' dispositive intent within the framework of a less rigorous insistence on the formalities of s.9. Legislative action and judicial creativity would then be united, not opposed: a combination which must surely

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56. Supra pp. 202-205.

be a fruitful one for the attainment of testators' intentions in this area of the law of succession.

It is to be hoped that such alterations in the existing law will be realised without further delay.

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## APPENDIX

### THE WIGRAM PROPOSITIONS

1. A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.
2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it as an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.
3. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of Law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible

in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

4. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shewn that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

6. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Prop. 7) will be void for

uncertainty.

7. Notwithstanding the Rule of Law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning - Courts of Law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined:-- where the object of a testator's bounty, or the subject of disposition (namely, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.